Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

PHILANDER DERMONT JENKINS, PETITIONER

v.

STATE OF MINNESOTA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MINNESOTA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Philander Jenkins was arrested in the common hallway of his rooming house. After the arrest, police accompanied Jenkins into his residence to get his shoes. After Jenkins was removed, several officer remained inside to "freeze the scene," to ensure no one went in or out of the room. While waiting inside, one officer saw what appeared to be the barrel of a handgun sticking out from under clothing, and that information was forwarded to officers drafting a search warrant. The warrant was obtained using information obtained while "freezing the scene," and police then "searched" and found a gun.

1. **When the resident has already been arrested in a common area outside his residence, and there is no search warrant and no exigent circumstances, are police allowed to enter and remain in the residence to 'freeze the scene," and thereby observe things they later include in the search warrant application for the same residence?**

The Prosecutor interfered with the ability of the defense to interview key child witnesses who had been present during the murders, by telling their father that the defense attorneys were "dangerous and bulldogs" and "hounds" who would stop at nothing to acquit their client. When the defense was finally able to subpoena the children for trial and put them on the witness stand at the tail end of trial, one of them named the real murderer, whom she had seen leaving - "Mooki." Immediately *after* trial defendant's investigation uncovered the real name of "Mooki" and the second shooter who one of the other child witnesses identified.

2. **Where the Highest State Court found that the Prosecutor interfered with defense access to key eye witnesses by calling them 'bulldogs" and 'hounds,"must the defendant also show prejudice in order to obtain a new trial? And if this Court determines federal law requires a showing of prejudice, are the facts of this case, where child witnesses could not be interviewed by the defense until the tail end of trial, sufficient to show prejudice?**

The State claimed at trial that a still picture of a bullet "found" by police on a windowsill near one body showed a bullet that had gone through the brain of that victim. After the bullet was collected by police as evidence, it was "washed," with no record of any notification to the defense. At trial, Jenkins learned that the police crime lab had videotaped the windowsill near the victim soon after arriving at the scene: no bullet is present. State witnesses confirmed that the still photograph showing the bullet on the windowsill were taken *after* the videotape: then the bullet is there. Jenkins contended that he was unable to show at trial that the bullet "found" on the windowsill lacked any human tissue or DNA, because it had been "washed."

3. **When police videotape of the windowsill near the body shows no bullet present, and then a later still picture shows the bullet now present, and that bullet is collected by police and claimed to have passed through the victim's body, does destroying the original condition of that bullet when collected from the windowsill by police violate due process? Is the original condition of the bullet when**

collected by police "apparently exculpatory" under *Brady* or if only "potentially exculpatory" under *Youngblood*, was there sufficient evidence of bad faith?

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The Reported Opinion of the Minnesota Supreme Court is reproduced at App. 1a.

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The order of the district court denying post-verdict motions is reproduced at App. ___

JURISDICTION

The Judgment of the Minnesota Supreme Court was issued on July 13, 2010, and served via U.S. Mail. On October 27, this Court granted Petitioner's application for extension and allowed until November 10, 2010 for filing of this Petition, and then on November 22, Jenkins' second motion for extension was granted until December 10, 2010. This Court has jurisdiction under 28 U.S.C. §1257.

RELEVANT PROVISIONS INVOLVED

The Fourth Amendment of the U.S. Constitution provides that

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

The Due Process Clause of the Fourteenth Amendment provides that

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

U.S. Const. amend. XIV.

STATEMENT

On March 14, 2007, two men were shot and killed in a house in Minneapolis, Minnesota. Philander Jenkins was arrested later that day at his rooming house, on a bench warrant issued in a different county. (App. 3a). Jenkins was first charged in the Minnesota state system, Fourth Judicial District (Hennepin County) with two counts of first degree murder, and two counts of felony murder based on the theory that the murders took place during a robbery. (App. 2a-3a).

Defendant moved to suppress evidence seized from his room, under U.S. Constitution. By pleading dated April 27, 2007, Jenkins moved to suppress evidence identified by the prosecuting attorney, in a pleading entitled Defendant's Demand for Evidentiary Hearing/s, Notice of Defenses & Witnesses, "on the basis of both the Minnesota and U.S. Constitutions...." The district court held an evidentiary suppression hearing, and in his "closing argument" dated December 31, 2007, Jenkins sought to suppress the evidence collected from his room after police remained to "freeze the scene," stating

> ***Source of Constitutional Law***
> Jenkins will rely on the U.S. Constitution, but because the Minnesota Constitution provides broader protection for its citizens (particularly in the area of search and seizure), Jenkins also makes these arguments under the State Constitution.

In that closing argument, Jenkins specifically cited to U.S. v. Dessesaure, 429 F.3d 359 (1st Cir. 2005).

The district court denied Jenkins' motions to suppress. (App. 45a-61a). The district court found the following: Jenkins was arrested in the common hallway outside his room. (App. 48a). From that point forward Jenkins was "in custody." (App. 54a). After the arrest, Jenkins requested permission to re-enter his room to obtain shoes and jacket. (App. 48a). Police officers then remained in Jenkins' room after Jenkins was removed, "freezing" the room until a search warrant arrived. *Id.* While in the "frozen" room, an officer saw a portion of a handgun underneath a pile of clothing. *Id.* The police relayed the information learned while "freezing" the scene to those preparing a search warrant application. *Id.* Police remained in Jenkins' residence until the search warrant arrived. (App. 55a).

In analyzing Jenkins' challenge under the Fourth Amendment of the U.S. Constitution, the district court held that police had "consent" to enter Jenkins' residence, although the district court did not analyze whether the consent was knowing and voluntary. (App. 53a). The district court held that police were "legitimately" inside Jenkins' room while freezing the

scene, and the plain view doctrine applied. *Id.* Jenkins' Fourth Amendment challenge was denied.

Jenkins also moved at the omnibus (suppression) hearing, "for sanctions due to violation of due process ("Trombetta·Rule"), and violation of Rule 9" (quote from Defendant's Notice of Omnibus Issues dated October 30, 2007). Jenkins specifically mentioned that the State had failed to preserve the evidence from the bullet police said was found in the windowsill. *Id.* This was *before* Jenkins learned that the bullet was not on the windowsill until *after* the videotape was shot (see below). Jenkins did not learn that until trial, but the police knew it at the time.

The case was tried in the district court, County of Hennepin, Minnesota.

During trial, Jenkins learned that the State claimed a still picture of a bullet "found" by police on a windowsill near one body showed a bullet that had gone through the brain of that victim. (T-Exh.18) After the bullet was collected by police as evidence, it was "washed," with no record of any notification to the defense. (A:40a).

During trial, Jenkins learned that the police crime lab officers who arrived at the scene videotaped first, then took still photos. T:3365-66. The crime scene video shows the kitchen window shade up and no bullet. Yet the still photos taken later show the window shade down and a bullet in the window groove. T-Exh:18,133.

The defense vigorously pursued access to the child witnesses throughout the case.

> And, Your Honor, there is the concept of fundamental fairness. You know, certainly we have a right, the defense has a right, I believe, if there has been access as well. In other words, it's – it seems unfair that they can develop the record only so far and that we have no ability to do what needs to be done to develop that record further in anticipation of trial.

(Defense counsel at August 22, 2007 hearing, 8/22/07T:85, and quoted in the defense Memorandum supporting post-verdict motions). During that hearing, the district court ordered the prosecutors not to say anything to the children's father that would impair their willingness to speak with the defense. (8/22/08T:87-88).

> The Court: Well, I think this. Speaking to the future, I direct the prosecutors and I direct the prosecutors direct the victim advocate in any conversations they have with the parents, the social workers or the children themselves not to directly or indirectly urge those people, the children, the social worker, the parent, as to whether they should or shouldn't grant access or to give them any advice on that.

But the defense could not obtain access to the children (but they did not know why). The only way the defense had to speak to these child witnesses was to subpoena them for trial. The children testified at the tail end of trial. One of the 6-year-olds testified she saw her Mommy going into one dead man's pockets. And one testified she saw a man leaving immediately after the

shooting, a man she knew as "Mooki." T:3994-5;T:4041;T:3987-88;T:4016;T:4019-20. After trial, the defense quickly investigated and learned Mooki's real name. T:SA:154. Following trial, the defense learned that a Prosecutor had interfered with the defense access to important child witnesses, by telling their father that the defense attorneys were "dangerous and bulldogs" and "hounds." (A:35-6a).

Jenkins filed post-verdict motions with the district court, arguing, *inter alia*, that his due process rights had been violated. Jenkins moved for a new trial, but also for acquittal on the basis of government misconduct (including prosecutors' interfering with access to child witnesses), stating,

> It is fundamentally unfair ["[E]very criminal defendant has the right to be treated with fundamental fairness and afforded a meaningful opportunity to present a complete defense." State v. Richards, 495 N.W.2d 187, 191 (Minn. 1992) (quoting California v. Trombetta, 476 U.S. 479, 485 (1984)] to force Defendant into a first trial, all the while blocking him from making a full defense, and then have the only remedy be a new trial."

is a quote from Jenkins' Memorandum supporting his post-verdict motions. Jenkins contended that the prosecution had interfered with defense access to child witnesses, so the defense could not prepare for trial and did not learn that a child had *seen Mooki leaving* the scene immediately following the shooting, until the end of trial, and the defense was unable to identify Mooki until after trial. Jenkins also identified numerous

Brady violations, again arguing due process violations. (Brady is cited throughout the defense memorandum supporting post-verdict motions). The district court denied all of these motions. (App. 62a-90a).

Jenkins was convicted by the district court, and sentenced to two terms of life in prison without possibility of release, to run consecutively. (A:2-3a).

Jenkins filed a direct appeal of right with the Supreme Court of the State of Minnesota. Pursuant to Minn.R.Crim.P. 29, that Highest State Court is the court of first appeal concerning first degree murder convictions.

Jenkins pursued a number of issues on direct appeal:

1. Freezing the scene.

Jenkins argued that remaining in Jenkins' residence, justified only as "freezing the scene," and relaying what is seen there in order to obtain a search warrant that would allow entry into that very residence, violates the Fourth Amendment.

Jenkins again cited to a decision of the First Circuit Court of Appeals, U.S. v. Dessesaure, 429 F.3d 359, 370 (1st Cir. 2005),

> There is no question that the police had no right to "freeze" the Quincy apartment where that meant entering it, looking around, searching, all the while ostensibly waiting for someone to get a warrant. Nothing in First Circuit or Supreme

> Court case law remotely justifies such a step. Nor should it. Searching without a warrant, on the assumption that the magistrate will no doubt agree with the officers that there is probable cause to search that location at that time, makes a mockery of Fourth Amendment protection. The warrant, and the review it requires, is reduced to a technicality.

and asked that the State adopt this analysis.

The Supreme Court of the State of Minnesota acknowledged that Jenkins had been arrested when he answered the door of the building. (A:6a). The Highest State Court found that Jenkins, "accompanied by officers, was allowed to retrieve shoes and a coat from his room." *Id.* And that after Jenkins was removed, officers remained behind in Jenkins room to "freeze" the scene to ensure that no one went in or came out. *Id.* That one of the officers, while remaining in Jenkins' room, saw "what appeared to be the barrel of a handgun" sticking out from under clothing near a chair and that information was forwarded to the officers seeking the warrant. (6-7a). A warrant was subsequently issued and a number of items were seized, including a gun. (7a, 10a).

The Supreme Court of the State of Minnesota analyzed Jenkins' Fourth Amendment challenge, as well as his citation to the Minnesota Constitution. That High State Court cited to this Court's decision in Illinois v. Gates, 462 U.S. 213, 238 (1983) for the proposition that the task of the warrant-issuing magistrate is simply to make a practical, common-sense decision about whether contraband or evidence of a

crime will be found in a particular place. (11a). The Highest State Court cited to its decision in *State v. Griffin*, 336 N.W.2d 519, 523-34 (Minn. 1983), which in turn cited to this Court's decisions in *Washington v. Chrisman*, 455 U.S. 1, 5-6 (1982) and *Coolidge v. New Hampshire*, 403 U.S. 443 (1968), for the proposition that "the so-called 'plain view' exception to the warrant requirement is a rule dealing with the seizure of evidence. It permits a police officer 'to seize what clearly is incriminating evidence or contraband when it is discovered in a place where the officer has a right to be." The Highest State Court held that,

> Here, the district court found that Jenkins asked that he be allowed to retrieve his shoes and coat from the room and that based on that request the officers were lawfully in Jenkins' room when they observed the [] gun.

(13a). The Highest State Court did not make any finding that Jenkins knowingly and voluntarily consented, and that it was not a post-arrest acquiescence to authority. The Highest State Court did not make any finding regarding whether the gun was in the "immediate area" around Jenkins pursuant to *Chimel v. California*, 395 U.S. 752 (1969). The Highest State Court did not make any finding that the incriminating nature of the evidence was immediately apparent.

The Highest State Court did not include any plain statement in its opinion that the federal cases were being used only for purposes of guidance, and the state cases cited were for propositions intertwined with federal Fourth Amendment law.

2. Due process violated by State's interference with witnesses.

Jenkins argued that the State denied Jenkins due process and fundamental fairness (citing to U.S. Const. Amend V, XIV) when prosecutors impermissibly interfered with the defense access to child witnesses. Jenkins did not learn until after trial that a Prosecutor had told the father, Dwayne Fowler, that the defense attorneys were "dangerous and bulldogs" and "hounds," who would stop at nothing to acquit their client. (35-6a). Jenkins noted that

> "[D]ue process is satisfied if the information is furnished before it is too late for the defendant to use it at trial." U.S. v. Almendares, 397 F.3d 653 (8th Cir. 2005). "It should be obvious to anyone involved with criminal trials that exculpatory information may come too late if it is only given at trial, and that the effective implementation of Brady v. Maryland must therefore require earlier production in at least some situations." U.S. v. Deutsch, 373 F.Supp. 289, 290 (D.C.N.Y. 1974).
>
> ...
>
> The State's intentional or bad-faith destruction of potentially exculpatory evidence implicates this rule and a defendant's constitutional due-process rights. California v. Trombetta, 467 U.S. 479, 485 (1984). "[F]ailure to collect potentially useful evidence is distinctly different than a destruction of evidence that is already extant." U.S. v. Martinez-Martinez, 369 F.3d 1076, 1087 (9th Cir. 2004), *certiorari* denied 543 U.S. 1013.

The defense argued that it could not adequately prepare its case, because it had to subpoena the children to be able to speak with them, and that testimony was at the tail end of trial. In particular, the defense argued that they did not learn until the end of trial that a child witness had actually seen 'Mooki' leaving the building following the shooting. And that made it too late to develop the lead, investigate the actual name of Mooki, and be able to use the information at trial. (35a).

. The Highest State Court agreed with Jenkins that the Prosecution's conduct had been improper, disparaging, and had "the clear potential to impede defense counsel's ability to investigate the case." (36a). The State Court held that the State violated Minn.R.Crim.P. 9.03. It should be noted that the *Mussehl* case cited by the State Court equates Minnesota Rule 9.03 with the ABA Standard 3-3.1(c) for prosecutors, which provides that "A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel."

Both *Webb v. Texas*, 409 U.S. 95 (1972) and *Washington v. Texas*, 388 U.S. 14, 19 (1967), discussing with the right of the defense to offer the testimony of witnesses without interference, are grounded in the due process clause. The State Court was reviewing Jenkins' due process argument under the U.S. Constitution. The State Court did not include any plain statement in its opinion that the decision was based solely on state law.

The State Court held that in addition to the wrongful interference of the State, that Jenkins must

show that the violation "prejudicially impeded his investigation of the case." (36a). And that Jenkins had not met this standard, because the defense attorneys were able to speak with the two youngest children before they testified. (36-7a).

3. Due process violated by destroying evidence already collected.

Jenkins argued on appeal that due process entitled Jenkins to an acquittal or a new trial, because the bullet already collected by police as evidence, and in the control of the State, had been washed, thereby destroying evidence that was "apparently exculpatory" under *Brady* and its progeny. (App. 40a).

Jenkins argued that the State's own witnesses testified that the videotape of the crime scene was shot first, and it showed no bullet, and the shade up. And that the State's own witnesses testified that the still picture of the bullet on the windowsill was shot later, and showed the shade down and a bullet on the windowsill. Jenkins contended that this was evidence of police tampering with the evidence (perhaps even planting the bullet on the windowsill), but that Jenkins could not prove that, because the bullet had been "washed" before he could show (for example) that there was no human tissue or DNA on the bullet.

The Highest State Court analyzed the issue under the *Trombetta* "preservation of evidence" standard, holding that Jenkins was required to show bad faith on the part of the State lab (BCA). The State Court held there was no evidence that the bullets were

cleaned "to avoid discovery of evidence beneficial to the defense." (App. 41a).

The State Court went on to state that even if Jenkins had shown bad faith, that the error was harmless beyond a reasonable doubt. (App. 41a). The State Court did not make a finding that the State lost the evidence. But it nonetheless cited to *State v. Bailey*, 677 N.W.2d 380, 393 (Minn. 2004). *Id. Bailey*, which cites to this Court's decision in *Arizona v. Youngblood*, discussed the State's inadvertent loss of evidence. The State Court cited liberally to federal cases in considering the *Brady* and *Trombetta* issues, and at no point did the State Court state that it was deciding the issue on the basis of state law.

REASONS FOR GRANTING THE PETITION

1. The State Court of Last Resort has Decided an Important Federal Question in a Way that Conflicts with the Decision of a Federal Court of Appeals.

The Minnesota High Court held in Jenkins, essentially, that police may maneuver their way into a residence *after* and arrest, and without any finding of knowing and voluntary consent by the one in custody, and view objects that are described in the search warrant application. Then, using the warrant that they obtained *after already inside the home*, police may enter the residence, and seize the objects. This analysis directly conflicts with the on-point discussion in *U.S. v. Dessesaure*, 429 F.3d 359, 370 (1st Cir. 2005),

> There is no question that the police had no right to "freeze" the Quincy apartment where that meant entering it, looking around, searching, all the while ostensibly waiting for someone to get a warrant. Nothing in First Circuit or Supreme Court case law remotely justifies such a step. Nor should it. Searching without a warrant, on the assumption that the magistrate will no doubt agree with the officers that there is probable cause to search that location at that time, makes a mockery of Fourth Amendment protection. The warrant, and the review it requires, is reduced to a technicality.

This is an important question. The purpose of the exclusionary rule is to deter unlawful conduct *by the police*. *Colorado v. Connelly*, 479 U.S. 157 (1986); *Michigan v. DeFillippo*, 443 U.S. 31 (1979). Jenkins contends that the Fourth Amendment is meaningless to citizens if police can search *before* obtaining the search warrant, and if a warrant becomes merely a rubber stamp, citizens will literally not be safe in their own homes. *U.S. v. Leon*, 468 U.S. 897 (1984).

2. The State Court of Last Resort has Decided an Important Question of Federal Law that has not been, but should be, settled by this Court, and the State and Circuit Courts are Split on How to Analyze the Issue.

The Minnesota State Court decided that the Prosecutor had interfered with the defense ability to interview the child witnesses. Jenkins had argued that this denied due process and fundamental fairness. The

State Court did not specifically discuss due process, but it discussed the equivalent (see above). Because depositions are not allowed in criminal cases in most states, the ability to interview witnesses becomes paramount. The Federal Circuits and High State Courts have dealt with this important issue in a variety of ways, but there is no clear path.

Webb v. Texas and *Washington v. Texas* are both cited with frequency, and for the proposition that interfering with a witness violates due process. *See, e.g., U.S. v. Wadlington*, 233 F.3d 1067 (8th Cir. 2000), and *Earp v. Ornoski*, 431 F.3d 1158 (9th Cir. 2005). The holdings in *Webb* and *Washington* have been extrapolated by some courts to prohibit the government's interference with the witnesses' free choice of whether to speak to the defense. *See, e.g., U.S. v. Lahera*, 1998 U.S. App. LEXIS 7581, *6 (6th Cir. 1998), cert. denied 525 U.S. 916, which noted that several cases have held that witness interference violates the constitutional right to a fair trial.

United States v. Rich, 580 F.2d 929 (9th Cir. 1978) held, without citation to authority, that "An accused and his counsel have rights of access to potential witnesses that are no less than the accessibility to the potential prosecutors and their investigatory agents. It is imperative that prosecutors and other officials maintain a posture of strict neutrality when advising witnesses of their duties and rights. Their role as public servants and as protectors of the integrity of the judicial process permits nothing less." But that case did not find a violation.

In 1985, the Ninth Circuit decided *U.S. v. Black*, 767 F.2d 1334, 1337-8 (9th Cir. 1985), held that both sides have the right to talk to witnesses before trial. But it did not agree with Black's citation to *Gregory v. U.S.*, 369 F.2d 185 (D.C. Cir. 1966).

The Idaho Supreme Court grappled with the issue in State v. Guzman, 138 Idaho 869 (Idaho 2003), citing to federal circuit court decisions, and considering the issue of how prosecutors may instruct witnesses about conversing with the defense in the context of due process and "elemental fairness."

By 2006, the Kentucky High Court acknowledged that it was an issue of first impression, in *Radford v. Lovelace*, 212 S.W.23d 72 (Ky. 2006). The Kentucky Court gathered and discussed numerous state and federal courts (including the *Mussehl* case the Minnesota Court cited to in Jenkins), although the basis for its conclusion is not clear.

As recently as March 2010, the district court for the Central District of California in Reynolds v. Yates,

The High State Court and the Circuits are split on the issue of whether the defendant must show prejudice, once interference has been found. *See, e.g., U.S. v. Thomas*, 488 F.2d 334 (6th Cir. 1973), and *Earp v. Ornoski, supra.* Note that *U.S. v. Goodwin*, 625 F.2d 693, 703 (5th Cir. 1980) (which cites both Washington and Webb) held that when such a violation of due process occurs, a court must reverse the conviction without regard to prejudice to the defendant. Both the Third and Sixth Circuits have stated that they would not require a finding of prejudice in order to reverse a

conviction because of an "interference-with-witness" due process violation. *U.S. v. Morrison*, 535 F.2d 223 (3d Cir. 1976); *U.S. v. Thomas*, 488 F.2d 334 (6th Cir. 1973).

Of course, the Minnesota High Court held that Jenkins was required to show prejudice even after it found interference by the Prosecutor. Jenkins was unable to locate case law that assisted in learning 'how much' prejudice he must show. Further, Jenkins does not understand why showing that the child witnesses, when put on the witness stand at the tail end of trial, who *identified a shooter leaving the house*, known only to them by a nickname, coupled with the defense inability to learn of the real name of that person until *after* trial, did not amount to prejudice.

It is true the District Court held that Jenkins must have known some of that information during trial or he would have sought a continuance. Without disturbing that finding, Jenkins submits that learning about a vital alternative perpetrator *during trial* is too late. Jenkins deadline to file alternative perpetrator evidence with the district court had long since passed. (See discussion of deadline at App. 15-16a). Note that the Minnesota High Court held at App. 14a that the exclusion of alternative perpetrator evidence "will almost invariably be declared unconstitutional when it significantly undermines fundamental elements of the defendant's defense."

And, *Karis v. Calderon*, 283 F.3d 1117, 1128 (9th Cir. 2002) held that a prosecutor's interference with a defendant's access to witnesses may constitute

misconduct, but that the misconduct is subject to a harmless error analysis.

Defense access to witnesses is all-important to the defense being able to investigate before trial, to prepare a defense to put on at trial, and to be able to effectively subpoena those witnesses and put them on the stand. It is equally important to be able to cross examine the government's witnesses. Even in cases (like this one), where the penalty can be life in prison, defendants are usually not allowed to take depositions to be able to learn the facts before trial. This case demonstrates how devastating that can be. Both federal and state courts would benefit from a clear rule from this Court, stating what prosecutors can and cannot do, and if interference is found, whether a showing of prejudice is required. Finally, Jenkins submits that his case may be a vehicle to explain what level of prejudice evidence must be shown, should this Court agree that it is required.

Jenkins submits that this Court should also rule upon the important issue of the distinction between "apparently exculpatory" evidence under *Brady* (which begets a new trial and sometimes even an acquittal), and "potentially exculpatory" evidence, which requires that the defendant show bad faith.

The Minnesota Court held that, even though police knew at the scene that the bullet in question had not been on the windowsill, and that when a still photograph was taken *later* the shade had been moved and the bullet had appeared, that the government was allowed to wash that bullet, forever preventing the defense from proving that bullet had been planted (or

mishandled, or tampered with). Jenkins had argued for a *Brady* analysis, that the destruction of evidence already extant (already collected by police, already in the custody and control of the government) warranted relief. Without meaningful analysis, the Minnesota Court characterized this as "potentially" exculpatory evidence.

In *Arizona v. Youngblood*, 488 U.S. 51, 55 (1988) this Court explained that "it must be apparent that the evidence is exculpatory before it is lost or destroyed." Although they are not all uniform, most of the Circuits have held, similar to the Minnesota Court in Jenkins, that if the evidence is "potentially exculpatory" that the defendant must show bad faith.

The vast majority of cases reviewed by Jenkins in preparing this Petition held that the missing, destroyed or lost evidence was only "potentially exculpatory," often without analysis. *See* cases collected at *Olszewski v. Spencer*, 466 F.3d 47 (1st Cir. 2006).

Jenkins respectfully suggest that his case provides the opportunity for this Court to refine the definitions of "apparently exculpatory" and "potentially exculpatory." The problem for defendants, is that police may well destroy evidence they *know* is exculpatory, but the defense cannot prove it without that very evidence. For example, if Jenkins had access to the bullet, and testing showed it had no human tissue, blood or DNA on it, Jenkins could have easily shown that it was not the same bullet that went through the brain of the deceased. However, because the bullet had been washed, Jenkins was only able to create the possibility that the bullet was not the one

that had gone through the victim. Doesn't that leave him vulnerable to the "potentially exculpatory" analysis?

In this case, however, the undisputed facts show, through testimony of the police witnesses, that the videotape was shot *first*, and that showed the shade up and no bullet. And then the shade was lowered, and a bullet placed in the windowsill, and then the still pictures was taken. Shouldn't that evidence, *known to police at the scene on the night of the murders* be attributed to the government, such that the original condition of *that bullet* was apparently exculpatory?

Jenkins' review of State and Circuit cases also yielded no actual findings of "bad faith." Jenkins urges that if the bad faith standard is impossible to meet, then police are free to dispose of all kinds of evidence, feeling certain that the defense will not be able to prove bad faith. Jenkins queries whether moving a bullet into a windowsill, pulling down the shade, and then taking a still picture – which the defense is told is a picture of the death bullet – is a sufficient showing of bad faith to warrant relief under the due process clause.

CONCLUSION

For the reasons stated above, the petition should be granted.

Respectfully submitted,
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STATE OF MINNESOTA

IN SUPREME COURT

A08-1269

Hennepin County — Page, J.

State of Minnesota,

Respondent,

vs.

Filed: May 20, 2010
Office of Appellate Courts

Philander Dermont Jenkins,

Appellant.

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota, for respondent.

Jill Clark, Golden Valley, Minnesota; and

Jill M. Waite, Minneapolis, Minnesota, for appellant.

SYLLABUS

1. The district court correctly determined that defendant's arrest and resulting seizure of his clothing was lawful, and the search warrant for defendant's room was supported by probable cause.

2. The district court properly excluded alternative-perpetrator evidence regarding four individuals because defendant failed to lay the proper evidentiary foundation.

3. The district court properly excluded evidence that the State reported a witness to child protective services a year before trial because it was only marginally useful for showing bias.

4. Defendant is not entitled to an acquittal for police or prosecutorial misconduct when he fails to prove that the police or prosecutor engaged in any prejudicial misconduct. Statements by the prosecution that defense attorneys were "dangerous and bulldogs" and "hounds" were improper, but not prejudicial.

5. Defendant is not entitled a new trial based on newly discovered evidence when the evidence was known during trial, could have been discovered before trial, and the evidence is not likely to produce a more favorable result.

6. The imposition of two consecutive life sentences without the possibility of release does not violate Minnesota Statutes § 609.035, subdivision 1, in cases involving multiple victims.

Affirmed.

OPINION

PAGE, Justice.

Appellant Philander Dermont Jenkins was indicted on two counts of first-degree premeditated murder and two counts of first-degree felony murder

for the shooting deaths of Lorenzo Porter and Eugene Curry and, after a jury trial, was found guilty on all counts. The district court entered convictions on the two first-degree premeditated murder counts and imposed consecutive sentences of life in prison without the possibility of release. In this direct appeal, Jenkins raises the following issues: (1) whether his arrest pursuant to a Crow Wing County bench warrant was unlawful and, if so, whether his arrest was otherwise supported by probable cause; (2) whether the district court erred in denying his motion to suppress evidence seized from his person incident to his arrest; (3) whether the district court erred in denying his motion to suppress evidence seized from the room where he lived; (4) whether the district court erred in excluding alternative-perpetrator evidence; (5) whether the district court erred in excluding certain bias evidence; (6) whether Jenkins' right to due process was violated by police; (7) whether his right to due process was violated by prosecutorial misconduct; (8) whether he is entitled to a new trial based on newly discovered evidence; and (9) whether the district court erred in imposing consecutive life sentences. We affirm Jenkins' convictions and sentences.

Background

Between 2:00 and 2:30 a.m. on March 14, 2007, Porter and Curry were shot to death in the first-floor unit of a North Minneapolis triplex. The unit, located at 2922 Dupont, was the home of Cassandra Simms, who lived there with her children. Simms, along with three of her children, 12-year-old S.F. and 5-year-old twins J.F. and D.F., and a friend, Patricia Walker, were present in the home during the hours leading up to and at the time of the shootings. Shortly after the shootings, Simms called the police from a neighbor's

telephone. Upon their arrival, the police found Porter's body in the kitchen on the floor and Curry's body in a bedroom off the kitchen. There was cocaine, baking powder, plastic bags, and a scale on the kitchen table and a footprint in the blood on the floor next to Porter's body. The pants worn by both Porter and Curry were pulled down with the pockets turned inside out. The police investigation proceeded quickly after their arrival.

Through interviews with Simms and Walker, the police learned that in the late afternoon hours on March 13, 2007, Porter, Curry, and Jenkins visited Simms' home. At the time, Jenkins was wearing a black hooded sweatshirt, black tennis shoes, and blue jeans. Porter, Curry, and Jenkins left the unit around 8 p.m. and at some point later that night Porter and Curry returned to the unit without Jenkins. Around midnight, Simms, who had been in bed sleeping since about 5 p.m., awoke and went to the kitchen to take some medication. Before going back to bed, Simms had a conversation with Jenkins, who by then had returned to Simms' unit. Sometime later, Jackie Mack and Marvin White stopped by and an argument ensued between Mack and Curry. During this argument, Mack threatened that she was going to send someone to shoot Curry. After the argument, Mack and White left.

Around 2:25 a.m., Simms, Walker, and the three children, who were all sleeping, were awakened by the sound of gunshots and gathered in the doorway to the unit's middle bedroom. According to Simms, she saw a taller man, who was wearing a black hooded sweatshirt and black shoes and pants walk toward the front door and leave the unit. Having gotten a glimpse of the man's clothing, Simms identified him as possibly Jenkins. At trial, she additionally testified that she saw

the man's face and it was Jenkins. According to Walker, she saw two men leave. One was wearing a black hooded sweatshirt, light jeans, and white shoes, and the other wore a black hooded sweatshirt, dark jeans, and black shoes. Walker recognized Jenkins' voice when one of the men yelled to the other to get going.

The police learned from Porter's brother that Porter had called his brother earlier that evening using a cell phone Porter owned. The cell phone, however, was not in the holster Porter was wearing and could not be found in the unit. As a result, the police sought and obtained the call log for the phone from Porter's cell phone service provider. The call log indicated that a number of calls were made on the phone after Porter's death. One of those calls was to a taxicab company. From the taxicab company, the police learned that a male and female passenger were picked up at 1714 Broadway in North Minneapolis and taken to the intersection of 18-1/2 Street and Quincy in Northeast Minneapolis.

Around 5:20 a.m. that morning, the police interviewed an occupant of the upstairs unit of the triplex at 2922 Dupont who indicated that a person the occupant knew as "Kill" or "Phil" had been shot a couple of days earlier and that "Phil" had recently tried to sell a gun to the occupant's brother. Viewing a photo of Jenkins, the occupant identified Jenkins as the person she knew as "Phil."

At some point that morning the police learned that Jenkins lived in a rooming house at 1811 Quincy in Northeast Minneapolis. They also learned that there was an outstanding Crow Wing County bench warrant for Jenkins' arrest. Based on all the information they had obtained, the police began the application process

for a warrant to search 1811 Quincy and dispatched the Violent Criminal Apprehension Team to that address. Upon their arrival, several officers approached the front door of 1811 Quincy and knocked. After several minutes, Jenkins answered the door, but lied about his identity. After determining that the man who answered the door was Jenkins, the officers placed him under arrest.

According to the arresting officers, once arrested, Jenkins, accompanied by officers, was allowed to retrieve shoes and a coat from his room. Before entering the room, Jenkins indicated that an unclothed woman was in the room. A female officer entered the room to verify that there was a woman inside and to allow her to get dressed. While in the room, the officer noticed two cell phones in plain view on a dresser. Information about the cell phones was forwarded to the officers applying for the search warrant. Once the woman, later identified as Lillian Blount, was clothed, the officer escorted her from the room and Jenkins briefly entered the room to retrieve his shoes and coat. Both Jenkins and Blount were then transported to the police department for questioning. When Jenkins arrived at the homicide unit, the police observed what appeared to be blood on Jenkins' clothing. As a result, the clothing was photographed and subsequently seized.

After Jenkins and Blount were taken to the homicide unit, several officers remained at the rooming house to "freeze" the scene to ensure that no one went in or came out of Jenkins' room before the search warrant could be procured. Two officers remained inside the room for about ten minutes after Jenkins was removed. One of those officers saw what appeared to be the barrel of a handgun sticking out from under

clothing near a chair in the room and that information was forwarded to the officers seeking the warrant. A warrant was subsequently issued, the room was searched, and a number of items were seized, including the two cell phones and the gun seen earlier by the officers.

Jenkins' version of his arrest was markedly different. At the suppression hearing, Jenkins testified that he never asked to retrieve any clothing from his room because he was wearing his coat and shoes at the time of his arrest. He further testified that, upon arrest, he was immediately escorted outside to a police vehicle and never returned to his room.

I.

First, Jenkins argues that his arrest pursuant to the Crow Wing County bench warrant was unlawful because the warrant was used as a pretext for probable cause to arrest him for the murders of Porter and Curry. He further contends the police did not otherwise have probable cause to arrest him for those murders. He suggests that the warrant was being used by the Minneapolis police in an effort to frame him for the murders because of a lawsuit he had successfully brought against them. Thus, he argues that the evidence seized pursuant to his arrest should have been suppressed.

The Fourth Amendment provides that

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. The Minnesota Constitution, using nearly identical language, also protects a person's right to be free from unreasonable searches and seizures. Minn. Const. art. I, § 10. However, for an arrest without a warrant, "this court independently reviews the facts to determine the reasonableness of the conduct of police" in making the arrest. *State v. Riley*, 568 N.W.2d 518, 523 (Minn. 1997). "The question of the legality of the arrest turns not on the reasonableness or practicality of obtaining a warrant, but on the reasonableness of the arrest." *Id.* Probable cause for an arrest exists when the police "reasonably could have believed that a crime has been committed by the person to be arrested." *Id.* (citation omitted) (internal quotation marks omitted). The reasonableness of the actions of the police is an objective inquiry based on the collective knowledge of the officers. *Id.* "The existence of probable cause depends on the facts of each individual case." *Id.* (citation omitted) (internal quotation marks omitted).

With respect to Jenkins' claim that the police misused the bench warrant to arrest him for the two murders, we first note that there can be no question that an arrest pursuant to a valid warrant is supported by probable cause and is therefore reasonable. Jenkins has not identified, and we have not found, any case in which we have held otherwise. Nor are we aware of any case in which we have looked beyond the validity of the warrant and examined law enforcement's motive for executing the warrant, and we decline to do so in this case. Jenkins did not challenge the validity of the Crow Wing County bench warrant at the trial court, nor has he done so here. Further, the record before us does not contain anything that calls into question the

validity of the bench warrant. Thus, we conclude that Jenkins' arrest pursuant to that warrant was proper.

Independent of the Crow Wing County bench warrant, we are satisfied, based on the record before us, that the police had probable cause to arrest Jenkins for the murders of Porter and Curry. The objective evidence supporting probable cause to arrest Jenkins for the murders and available to police at the time the arrest includes the following: a statement from a witness indicating that just days before the murders Jenkins was in possession of a gun; Jenkins spent much of the late afternoon and early evening before the murders with the two victims at the location where they were killed; Jenkins was seen at the location where the murders occurred; an occupant of the triplex unit where the murders took place informed police officers that she saw a man wearing clothing similar to those worn by Jenkins that evening leaving the scene shortly after the murders took place; and that occupant affirmed that Jenkins could have been the person she saw leaving the scene shortly after the murders.

The police also knew that the cell phone of one of the victims could not be found at the crime scene; that the missing cell phone was used sometime after the murders to call a taxicab operator, who dispatched a taxicab to 1714 Broadway in North Minneapolis; and that the taxicab picked up a man and a woman from that address and dropped them off at 18-1/2 Street and Quincy in Northeast Minneapolis. The police were aware that Jenkins lived at 1811 Quincy in Northeast Minneapolis, which was close to the location where the taxicab dropped off the man and the woman. Finally, when the police arrived at 1811 Quincy and confronted Jenkins, he lied to them about his identity. Based on this evidence, we conclude that the information

available to the police at the time of Jenkins' arrest supports probable cause for that arrest.

II.

Jenkins also argues that his clothing was unlawfully seized incident to his arrest. This argument also fails. During a lawful custodial arrest, the police are authorized to perform a full search of the person without a warrant. *United States v. Robinson*, 414 U.S. 218, 225 (1973). "[T]he effects in [the arrestee's] possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant." *United States v. Edwards*, 415 U.S. 800, 807 (1974); *see also State v. Smith*, 295 Minn. 65, 70, 203 N.W.2d 348, 351-52 (1972) ("The seizure of defendant's boots at the time of booking was a valid search and seizure incident to arrest."). "This is true where the clothing or effects are immediately seized upon arrival at the jail, held under the defendant's name in the 'property room' of the jail, and at a later time searched and taken for use at the subsequent criminal trial." *Edwards*, 415 U.S. at 807. Accordingly, because we conclude that Jenkins' arrest was lawful, we also conclude that the seizure of Jenkins' clothing was lawful as a seizure incident to a lawful arrest.

III.

Next, we address Jenkins' argument that items seized from his room at 1811 Quincy, including the cell phones and gun, should have been suppressed because the application for the warrant authorizing the search of the room was not supported by probable cause. More specifically, he contends that references to the cell phones and gun observed in his room were improperly included in the affidavit supporting the warrant application because the officers who provided

information about the cell phone and gun were not lawfully in his room when those items were first discovered. He further contends that, when the cell phones and gun are excluded from the warrant application, the application is not supported by probable cause. In addition, he argues that the application was facially invalid because it misstated the destination supplied by the taxi driver.

When reviewing a district court's decision to issue a search warrant, our only consideration is whether the judge issuing the warrant "had a substantial basis for concluding that probable cause existed." *State v. Rochefort*, 631 N.W.2d 802, 804 (Minn. 2001). We review the district court's factual findings for clear error and the district court's legal determinations de novo. *State v. Buckingham*, 772 N.W.2d 64, 70 (Minn. 2009). We give the district court's factual determinations great deference. *Rochefort*, 631 N.W.2d at 804. In doing so, we are to consider the totality of the circumstances and "must be careful not to review each component of the affidavit in isolation." *State v. Wiley*, 366 N.W.2d 265, 268 (Minn. 1985).

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Illinois v. Gates, 462 U.S. 213, 238 (1983). Elements bearing on this probability determination include information establishing a nexus between the crime,

objects to be seized and the place to be searched. *State v. Souto*, 578 N.W.2d 744, 747 (Minn. 1998); 2 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 3.7(d) (4th ed. 2004).

Before trial, Jenkins sought to suppress the cell phones and gun found in his room by police officers. At that hearing, Jenkins argued that when the police discovered the cell phones and gun the police were unlawfully in his room. The State, arguing that the police were lawfully in the room, offered evidence indicating the two cell phones were observed by an officer in plain sight when the officer entered the room to allow Blount, who was in the room but unclothed, to dress before she was escorted out of the room. The State also provided evidence that another officer observed the gun in plain sight when that officer entered the room with Jenkins to allow Jenkins to get his shoes and coat.

The district court found that the police were lawfully in the room when the cell phones and gun were discovered because Jenkins requested permission to enter his room to retrieve his shoes and coat. Relying on testimony from Blount that the officers "eye searched" the room without moving anything and testimony from the officers that they did not have to move anything in the room in order to see the cell phones or gun, the court further found that those items were in plain sight and therefore were properly included in the search warrant application.

We are satisfied that the cell phones and the gun were properly included in the warrant application. We have held that an officer may lawfully accompany an arrestee into his room after an arrest outside the room in order for the arrestee to retrieve items such as a coat and shoes. *State v. Griffin*, 336 N.W.2d 519, 523-24

(Minn. 1983). Here, the district court found that Jenkins asked that he be allowed to retrieve his shoes and coat from the room and that based on that request the officers were lawfully in Jenkins' room when they observed the cell phones and gun. The court's findings are supported by the record and are not clear error. Therefore, Jenkins' argument seeking suppression of the cell phones and the gun fails.

His argument that the warrant was facially invalid because the affidavit misidentified the destination of the taxi that picked up the male and female passengers at 1714 Broadway as 1811 Quincy Avenue when it should have been 1807 Quincy Avenue has no merit. " 'Misrepresentations invalidate a warrant when they are (1) deliberately or recklessly made, and (2) material to establishing probable cause, meaning probable cause could likely not be established without them.' " *State v. Mems*, 708 N.W.2d 526, 532 (Minn. 2006) (quoting *State v. Jones*, 678 N.W.2d 1, 12 (Minn. 2004)). Although the warrant application here misstates the location where the taxicab dropped the man and woman off, Jenkins has not pointed us to, and we have not found, anything in the record before us suggesting that the misstatement was deliberately or recklessly made or that the precise location of their drop off was material to establishing probable cause. Thus, Jenkins is not entitled to any relief on this claim.

IV.

We next address Jenkins' argument that the district court erred in excluding evidence implicating Simms, Walker, Mack, and White as alternative perpetrators. Evidentiary rulings are within the discretion of the district court and will not be overturned absent an abuse of that discretion. *State v. Vance*, 714 N.W.2d 428, 436 (Minn. 2006). However, the

exclusion of alternative-perpetrator evidence "will almost invariably be declared unconstitutional when it significantly undermines fundamental elements of the defendant's defense." *Jones*, 678 N.W.2d at 16 (citation omitted) (internal quotation marks omitted). Every defendant has a constitutional right to present a complete defense, including evidence tending to prove another person committed the crime. *Id.* at 15-16, 19; *see also* Minn. Const. art. 1 § 6. This right is not absolute; courts may limit the defendant's evidence to ensure that the defendant does not confuse or mislead the jury. *State v. Hannon*, 703 N.W.2d 498, 506 (Minn. 2005).

As a threshold matter, in order for alternative-perpetrator evidence to be admissible, the defendant must offer evidence having an inherent tendency to connect the alternative perpetrator to the commission of the charged crime. *Jones*, 678 N.W.2d at 16. The purpose of this foundational requirement is to "avoid[] the use of bare suspicion and safeguard[] a third person from indiscriminate use of past differences with the deceased." *State v. Richardson*, 670 N.W.2d 267, 280 (Minn. 2003) (quoting *State v. Hawkins*, 260 N.W.2d 150, 159 (Minn. 1977)). If the defendant fails to meet this foundational requirement, the alternative-perpetrator evidence is not admissible and the trial court need not consider any of the alternative-perpetrator evidence further. *State v. Palubicki*, 700 N.W.2d 476, 485 (Minn. 2005). If the defendant meets the foundational requirement the defendant may then, subject to the ordinary rules of evidence, "introduce evidence of a motive of the third person to commit the crime, threats by the third person, or other miscellaneous facts which would tend to prove the third person committed the act," in order to cast reasonable

doubt on the State's case. *Hawkins*, 260 N.W.2d at 159; *see also State v. Bock*, 229 Minn. 449, 458-59, 39 N.W.2d 887, 892-93 (1949).

The district court found, based on the totality of all the evidence offered, that Jenkins failed to produce evidence having an inherent tendency to connect either Simms, Walker, Mack, or White to the commission of the charged crime. While it is difficult to identify Jenkins' precise claims of error, we understand Jenkins to be making three constitutional arguments challenging the foundational requirement for the admission of alternative-perpetrator evidence: (1) the requirement impermissibly places the burden of proof on the defendant; (2) it contains a deadline for the submission of such evidence which interferes with a defendant's right to present a complete defense; and (3) the requirement violates a defendant's right to have a meaningful opportunity to present a complete defense as held in *Holmes v. South Carolina*, 547 U.S. 319 (2006). In addition, Jenkins argues that the evidence proffered satisfies the foundational requirement.

A.

Due process prevents the state from placing the burden of disproving *elements* of a crime upon the defendant. *State v. Cannady*, 727 N.W.2d 403, 408 (Minn. 2007); *State v. Hage*, 595 N.W.2d 200, 204 (Minn. 1999); *see also* U.S. Const. amend. XIV. Jenkins claims that requiring criminal defendants to show that the proffered alternative-perpetrator evidence has an inherent tendency to connect the alternative perpetrator to the commission of the charged crime violates due process because it shifts the burden of proof to the defendant. This claim fails on its face.

Jenkins was charged with two counts of first-degree premeditated murder and two counts of first-

degree felony murder. The elements of first-degree premeditated murder are the death of a human, defendant caused that death, defendant acted with premeditation, and defendant intended to kill the victim or another. Minn. Stat. § 609.185(a)(1) (2008). The elements of first-degree felony murder, in which the underlying felony is aggravated robbery, are the death of a human, defendant caused that death, defendant intended to kill the victim or another, and defendant was engaged in the act of committing or attempting to commit the crime of aggravated robbery when he caused the death. Minn. Stat. § 609.185(a)(3) (2008). The problem for Jenkins in making his burden-shifting claim is that the requirement that a defendant lay a proper foundation before alternative-perpetrator evidence will be admitted does not require Jenkins to produce evidence on an essential element of the charged offenses, nor did Jenkins' failure to lay a proper foundation for the alternative-perpetrator evidence prevent an essential element from ever reaching the jury. Thus, the district court did not require Jenkins to either prove or disprove any element of the offense. Because Jenkins was not required to either prove or disprove any element of the charged offense, his right to due process was not violated.

B.

Due process also includes the right to be treated with fundamental fairness and a meaningful opportunity to present a complete defense. *State v. Netland*, 762 N.W.2d 202, 208 (Minn. 2009); *see also* U.S. Const. amend. XIV; Minn. Const. art. I, § 7. Jenkins' trial commenced on February 11, 2008. On January 11, 2008, Jenkins brought a motion seeking the admission of the alternative-perpetrator evidence because, according to Jenkins, the district court

required that he address the admission of alternative-perpetrator evidence before trial. That motion was argued at a pretrial hearing on January 22 and 23. The district court denied Jenkins' motion on the record at the hearing and issued an order on February 1, 2008, formally denying the motion. Jenkins asserts that requiring the foundation for the admission of alternative-perpetrator evidence to be laid before trial violated his right to due process.

Presumably, Jenkins' complaint is that, by requiring him to raise the alternative-perpetrator issue before trial, he was in some way precluded thereafter from revisiting the admission of such evidence based on information discovered subsequent to the hearing but before the end of his trial. This due process claim necessarily fails. The district court made clear at the time it denied Jenkins' motion that Jenkins was free to revisit the issue during trial if he felt there was other evidence available to meet the foundational requirement. Moreover, as Jenkins acknowledges in his brief and as the record bears out, he was permitted to, and in fact did, revisit the alternative-perpetrator issue on a number of occasions during the trial. In that the district court informed Jenkins that the alternative-perpetrator issue could be revisited and subsequently was revisited on a number of occasions during the trial, we conclude that Jenkins was not denied due process.

C.

A defendant's right to present a meaningful defense includes the right to present evidence that a third party may have committed the crime for which the defendant is charged. *Jones*, 678 N.W.2d at 15-16; *see also* Minn. Const. art. 1 § 6. Jenkins contends, however, that the United States Supreme Court's holding in *Holmes v. South Carolina* renders our

standard for admitting alternative-perpetrator evidence unconstitutional. We disagree. In *Holmes*, the Supreme Court declared unconstitutional South Carolina's law denying evidence of a third-party's guilt solely because the State had a strong forensic case. 547 U.S. at 330-31. Our foundational requirement differs greatly in that admissibility depends exclusively on whether the evidence offered by the defendant inherently connects an alternative perpetrator to the commission of the charged crime regardless of the strength of the State's case. Furthermore, *Holmes* specifically identified *Jones* as an example of the "widely accepted" foundational requirement that "neither the petitioner nor his amici challenge." *Id.* at 327. The United States Supreme Court's decision in *Holmes* did not render the foundational requirement from *Jones* unconstitutional.

D.

Jenkins further contends that, even if the foundational requirement is constitutional, he met the requirement with respect to each of the individuals and therefore the district court erred in denying the admission of the alternative-perpetrator evidence. With respect to White, Jenkins offered evidence indicating that White was present in Simms' triplex unit several hours before the murders occurred. The district court found this evidence insufficient to connect White to the commission of the charged crimes because "[m]ere presence at or near a crime scene does not in itself show an inherent tendency to commit the crime." Jenkins argues that showing a person's presence at a crime scene is sufficient to meet the foundational threshold and cites *State v. Palubicki*, 700 N.W.2d at 485-86, for that proposition.

We have consistently held and recently reaffirmed that "[m]ere presence at the scene of the crime does not, by itself, create an inherent tendency to connect a person alleged to be the alternative perpetrator to the commission of the charged crime." *State v. Atkinson*, 774 N.W.2d 584, 590 (Minn. 2009) (citing *State v. Flores*, 595 N.W.2d 860, 868-69 (Minn. 1999)). As for *Palubicki*, the case has to be read in context. In *Palubicki*, the defendant's effort to connect the alleged alternative perpetrator to the commission of the charged crime consisted only of a plan to rob the victim and the alternative perpetrator's alleged, yet unrelated, criminal activity. *Palubicki*, 700 N.W.2d at 485-86. The defendant did not assert that the alleged alternative perpetrator was present at the place and time of the crime. *Id.* at 486. Nor did the defendant offer any other evidence linking the alternative perpetrator to the charged crime. *Id.* In concluding that the district court did not abuse its discretion when it found that Palubicki failed to satisfy the foundational requirement, we simply noted that the evidence offered to satisfy the requirement not only did not "involve any evidence placing [the alleged alternative perpetrator] near the scene" of the charged crime it also did not "involve any evidence from which it could be inferred that [the alternative perpetrator] was present at the time" of the crime. *Id.* The import of what we said in *Palubicki* is that there was no evidence, not even presence, linking the alleged alternative perpetrator to the charged crime, much less to the commission of the charged crime. We did not hold that presence alone was sufficient to satisfy the foundational requirement. Thus, Jenkins' reliance on *Palubicki* is misplaced. Because the evidence submitted by Jenkins at most established that White was present in Simms' triplex

unit at some point on the night of the charged crime, we conclude that the evidence did not have an inherent tendency to connect White to the actual commission of the charged crime. We therefore hold that the district court did not abuse its discretion when it found that Jenkins failed to satisfy the foundational requirement for the admission of alternative-perpetrator evidence related to White.

With respect to Mack, Jenkins only offered evidence that Mack was present in Simms' unit at some point on the night of the murders. The district court found that Jenkins failed to satisfy the foundational requirement. For the reasons discussed above, that finding by the district court was not an abuse of discretion. During trial, Jenkins obtained information that on the night of the murders Mack threatened to have someone kill Curry. Jenkins, however, did not seek to revisit the district court's earlier ruling with respect to Mack's alternative-perpetrator status. Having failed to revisit the ruling during trial, Jenkins cannot now complain that he was denied due process because the district court failed to allow Jenkins to introduce alternative-perpetrator evidence involving Mack. We also note that any failure to allow the admission of alternative-perpetrator evidence involving Mack likely had no impact on the jury's verdict. Jenkins did not make an offer of proof indicating what additional evidence he would have sought to admit at trial if he had satisfied the foundational requirement, and evidence of Mack's threat against Curry was admitted at trial, from which Jenkins was able to argue in closing that Mack could have been the shooter.

Jenkins' attempt to meet the foundational requirement with respect to Walker was also insufficient. Jenkins argued that Walker was present in

the triplex at the time the murders occurred, told inconsistent stories regarding the identity of the shooter, knew the victims were dealing drugs from the triplex, and would lie to protect Simms. But, even if Walker was inconsistent in identifying who she saw leaving Simms' triplex unit the night of the murders or knew that the victims were dealing drugs from the unit or would lie for Simms, those facts do not in any way link Walker to the actual commission of the charged crime. Thus, the only offered evidence linking Walker to the charged crime was Walker's mere presence at the crime scene. And, as discussed above, evidence of mere presence does not satisfy the foundational requirement. Therefore, we hold that the district court did not err when it found the foundational requirement for the admission of alternative-perpetrator evidence was not met with respect Walker.

At the pretrial hearing, Jenkins asserted that the following evidence had an inherent tendency to connect Simms to the actual commission of the charged crime: (1) Simms' presence in her triplex unit at the time of the murders; (2) Simms receiving threats from certain of the victims' family members alleging that Simms had committed the murders; (3) the victims were dealing drugs from Simms' triplex unit; (4) Simms' fingerprints were found on ordinary household objects in her residence; (5) Simms remained in the house for some amount of time before calling the police; (6) Simms' story, which included her identification of the person leaving her triplex unit after the shootings evolved from the 911 call until the time she testified; (7) Simms took medication for mental illness; (8) Simms had a cocaine habit; (9) Simms regularly mixed her medications with cocaine, resulting in violent outbursts, including an outburst that resulted in Simms throwing

bleach in a man's face; and (10) Simms' flight to California shortly after the murders.

Based on our careful review of the record, we conclude that the district court did not err when it ruled that Jenkins did not meet the foundational requirement for the admission of alternative-perpetrator evidence relating to Simms. While the evidence proffered with respect to Simms places her at the scene at the time the crime occurred, the assertions made by Jenkins do not connect Simms to the commission of this crime. Moreover, our task is to determine whether the evidence, not the assertions, contained in the proffer provides the required "something more" than mere presence. We conclude that it does not. For example, Jenkins asserts that Simms "fled" to California, but the evidence merely shows that Simms went to California and does not indicate that she fled. Like the additional evidence proffered with respect to Walker, none of the additional evidence proffered with respect to Simms links Simms in any way to the actual commission of the charged crimes. We therefore hold that the district court did not err when it found that Jenkins did not satisfy the foundational requirement for the admission of alternative-perpetrator evidence with respect to Simms.

V.

We next address Jenkins' claim that the district court erroneously excluded evidence showing bias on the part of Simms in favor of the prosecution. In its motion in limine, the State moved to exclude as irrelevant "[e]vidence regarding the decision of police not to place [Simms'] children on a hold for their protection and any evidence regarding the fact that the

State reported Ms. Simms to child protection." The discussion at the hearing went as follows:

> THE COURT: "The evidence regarding the decision of the police not to place children on a hold for their protection and any evidence regarding the fact that the State reported Miss Simms to Child Protection."
>
> Why would that be relevant, defense team?
>
> Why would it be relevant?
>
> Well, first of all, do you oppose the motion?
>
> MS. CLARK: I see it as two parts and yes, we would, and we do think it's relevant.
>
> We think this is a typical way that police will turn mothers, is to hold in abeyance the threat that they'll take their children from them if they don't give them the information that they want.
>
> We see this happen a lot.
>
> It seems like it's fair game for why Cassandra Simms is changing her story in favor of the police theory of the case more and more as time goes on.
>
> And then Part B, any evidence regarding the fact that the State reported Miss Simms to Child Protection, I'm not sure that I understand that.

> Are the prosecutors talking about that they themselves got these children into the CHIPS system? I'm not sure.
>
> THE COURT: Well, they did get into the CHIPS system, I guess.
>
> MS. CLARK: You know, off the top of my head -- I mean I'm -- we're certainly not going to put the prosecutors on the stand.
>
> I don't know.
>
> Since I don't really understand the motion, I don't really know if it's going to be relevant.
>
> It may be relevant to some other rulings the Court makes outside the hearing of the jury that has to do with these child witnesses, but to be honest, off the top of my head, I don't know.
>
> I really don't.
>
> THE COURT: Well, I'm going to grant that motion.
>
> You have the right to reopen it if the circumstances change, the defense team.

The State also sought to exclude "[a]ny information about the CHIPS proceeding involving [D.F., J.F. and S.F.]." The discussion with respect to that evidence went as follows:

THE COURT: "Any information about the CHIPS proceeding involving [D.F., J.F. and S.F.]."

What's your reason for that motion?

MS. JOHNSTON: Well, your Honor, I think that the CHIPS proceeding would not be relevant.

It would not be relevant to the trial of this case and to the defendant's guilt or innocence whether or not Cassandra Simms was an unfit parent, whether or not she has had a transfer of legal custody in her case.

I think that's a collateral proceeding that is not relevant to this proceeding.

It is, to some degree, a confidential proceeding, and I guess on relevancy grounds alone I would think it would not be allowed.

THE COURT: Okay.

Any comment about that, Miss Waite or Miss Clark?

MS. CLARK: We talked about this over lunch, and we can't see that it would be an issue.

It's possible it could come in in a sideways way.

> I mean we don't totally understand what happened with these CornerHouse tapes of them, but it's our understanding that that was done while they were actually in the custody of the State.
>
> So that's the only way I could envision it coming in, but it's not like we want to put on evidence --
>
> THE COURT: The motion is granted unless you get permission to do it.

Construing Jenkins' counsel's arguments at the pretrial hearing liberally, it appears from the discussion that Jenkins objected to the part of the motions seeking to exclude evidence relating to the police not placing the children on a temporary hold for their protection, but did not object to the remainder of the motions. The district court excluded the evidence on relevance grounds. We review a trial court's evidentiary rulings for an abuse of discretion. *State v. Vance*, 714 N.W.2d 428, 436 (Minn. 2006). Absent an objection, our review is for plain error and involves four steps. *Rairdon v. State*, 557 N.W.2d 318, 323 (Minn. 1996). First, we ask (1) whether there was error, (2) whether the error was plain, and (3) whether the error affected the defendant's substantial rights; that is, "if [the error] had the effect of depriving the defendant of a fair trial." *Id.* If we determine that there was error that was plain and that affected the defendant's substantial rights, we " 'then assess [ ] whether [we] should address the error to ensure fairness and the integrity of the judicial proceedings.' " *State v. Tscheu*, 758 N.W.2d 849, 863 (Minn. 2008) (alterations in original) (quoting *State v.*

Griller, 583 N.W.2d 736, 740 (Minn. 1998)). If the answer to any one of the three initial questions is resolved in the negative, the claim fails and the defendant is not entitled to any relief. *State v. Gutierrez*, 667 N.W.2d 426, 433-34 (Minn. 2003). An error is plain "if it was 'clear' and 'obvious.'" *State v. Ramey*, 721 N.W. 2d 294, 302 (Minn. 2006) (quoting *State v. Strommen*, 648 N.W.2d 681, 688 (Minn. 2002)). Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Minn. R. Evid. 401. Evidence that is not relevant is not admissible. Minn. R. Evid. 402.

Jenkins now claims that the excluded evidence was relevant and should have been admitted to show Simms' bias in favor of the prosecution. Specifically, he claims that the State both threatened to take Simms' children away if Simms did not cooperate with prosecutors and initiated a CHIPS proceeding as a "carrot" to obtain that cooperation. On the record before us, we conclude that the district court did not err when it excluded the evidence.

We first note that at the hearing on the motions, Jenkins did not specifically argue that any of the evidence relating to the police not placing the children on a hold, the State reporting Simms to Child Protection, and the children's CHIPS proceeding was relevant to showing that Simms was biased in favor of the State. While he did make the assertion that "a typical way that police will turn mothers, is hold in abeyance the threat that they'll take their children from them if they don't give them the information they want," Jenkins made no effort to connect that practice to what happened in this case. Nor did Jenkins attempt

to explain how the fact that the State subsequently reported Simms to child protection or information about the CHIPS proceeding caused Simms to be biased towards the State. Further, we note that Jenkins made no showing of the ways in which Simms' statements changed to be more favorable to the prosecution between the time of the statement she gave to police identifying Jenkins as the one she saw leaving her triplex unit shortly after the murders occurred and the time of the motion hearing. Finally, we note that the record indicates that by the time of the motion hearing Simms' children were in the custody of the children's father and that Simms had the right to reasonable visitation.

In that Jenkins did not specifically argue at the motion hearing that the evidence was necessary to show bias on the part of Simms, or explain how the subsequent reporting of Simms to child protection or how information about the CHIPS proceeding showed bias on the part of Simms, the district court was not in a position to evaluate whether the evidence the State was seeking to exclude had a tendency to make Simms' bias towards the prosecution more or less probable than it would be without the evidence. The same is true with respect to Jenkins' failure to either provide any evidence or otherwise explain how the police practice of "turning mothers" caused Simms to be biased in this case. Therefore, we conclude that the district court did not abuse its discretion or commit any error when it granted the State's motion to exclude the evidence on relevance grounds.

VI.

Next, we address Jenkins' allegation that the police engaged in misconduct and violated his right to due process by targeting him to the exclusion of other

suspects as evidenced, he claims, by the fact that within three hours of the murders the police had identified him as the shooter. To show motive for the misconduct, Jenkins sought to admit evidence of two lawsuits, one that he had successfully brought against the Minneapolis Police Department and one he had brought against the Minnesota Bureau of Criminal Apprehension (BCA). The district court ruled that, absent a showing by Jenkins that the police targeted Jenkins, evidence of a motive to target Jenkins was inadmissible because it would be irrelevant, speculative, and prejudicial. The district court made clear at the time it ruled, however, that if Jenkins later was able to provide evidence of targeting then evidence of motive would be admissible.

Jenkins' targeting claim fails. First, we conclude that the district court did not abuse its discretion when, after extensive discussion, it excluded evidence relating to the two lawsuits Jenkins claimed provided a motive for the police to target him. Although he had alleged targeting, at the time of the discussion Jenkins had not presented any evidence of targeting. As the district court noted, permitting motive evidence without a showing of targeting puts the cart before the horse. That is to say, until there is evidence of targeting, motive evidence is irrelevant, speculative, and prejudicial. Jenkins now argues that his targeting claim is supported by evidence that a bullet found in the kitchen windowsill may have been planted. Whatever the merits of this argument are, the argument was not made to the district court at the time it was considering the admission of the motive evidence. Nor did Jenkins attempt to revisit the issue during trial, even though he raised the alleged planting of the bullet during cross-examination of a number of witnesses and strenuously

argued during closing argument that the bullet was planted.

Moreover, the record belies Jenkins targeting argument. The undisputed evidence indicates that when questioned by the police upon their arrival at Simms' triplex unit, Simms and Walker identified Jenkins as a person seen leaving the unit shortly after the murders. The police also learned within a short time that Porter's cell phone was missing and had been used after Porter's death to order a taxicab to take a man and a woman from 1714 Broadway in North Minneapolis to Quincy and 18-1/2 Street in Northeast Minneapolis, which was within a block of where Jenkins lived. In addition, they learned that Jenkins was in possession of a gun days before the murders. Further, when the police went to the rooming house where Jenkins lived, Jenkins answered the door and lied about his identity, they found the missing cell phone and a gun in his room, and after his arrest discovered bloodstains on the clothes he was wearing. This evidence amply supports the State's argument that the evidence led the police to Jenkins and, when coupled with our conclusion that the district court did not abuse its discretion when it excluded the motive evidence Jenkins sought to admit, Jenkins' due process argument necessarily fails.

VII.

We next address Jenkins' prosecutorial misconduct claims.[1] In his post-trial motion for a new

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[1] We address Jenkins' claims of prosecutorial misconduct based on what we understand those claims to be. The claims, which are unclear at best, are presented in an argumentative and cumbersome

(Footnote continued on next page.)

trial, Jenkins argued, as he does here, that the prosecution: (1) failed to meet its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963); (2) interfered with his access to material witnesses; (3) interfered with his access to material evidence; and (4) failed to preserve and destroyed material evidence. We must determine if the State committed any misconduct and, if it did, "we will grant a new trial when the misconduct impaired the defendant's right to a fair trial." *State v. Graham*, 764 N.W.2d 340, 347 (Minn. 2009) (citation omitted) (internal quotation marks omitted). "For objected-to prosecutorial misconduct, we have utilized a harmless error test, the application of which varies based on the severity of the misconduct." *State v. Wren*, 738 N.W.2d 378, 389 (Minn. 2007) (noting that it has not been determined whether the two-tiered approach articulated in *State v. Caron*, 300 Minn. 123, 127-28, 218 N.W.2d 197, 200 (1974) "should continue to apply to cases involving objected-to prosecutorial misconduct" (quoting *State v. Ramey*, 721 n.W.2d 294, 302 (Minn. 2006))); *see also State v. Cabrera*, 700 N.W.2d 469, 473-74 (Minn. 2005). For the most part, the district court found that there was no prosecutorial misconduct. To the extent that the court found misconduct, it concluded that the misconduct did not

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(Footnote continued from previous page.)
charted format and provide no citation to the record or law. As a result, deciphering Jenkins' specific claims of prosecutorial misconduct is challenging. While we address Jenkins' claims to the extent possible, we caution that such formatting and the use of unsupported arguments are strongly disfavored.

result in any prejudice to Jenkins by impairing his right to a fair trial. Our review of the record leads us to the conclusion that the district court was correct.

With respect to his claim that the prosecution violated its obligations under *Brady v. Maryland*, Jenkins asserts that the State did not disclose blood spatter pictures from the crime scene, research from a shoeprint expert, that same expert's second report, and a threat made by Mack just hours before the murders that she would send someone to shoot Curry. Rule 9.01, subdivision 1, of the Minnesota Rules of Criminal Procedure, requires the prosecution to disclose, without order of the court, upon request of the defense counsel, any matters within the prosecuting attorney's control including photographs, reports, and other expert opinions that tend to negate or reduce the guilt of the accused. The failure of the prosecution to disclose evidence is grounds for a new trial if the evidence is material. *Pederson v. State*, 692 N.W.2d 452, 459-60 (Minn. 2005) (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)); *see also Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment."). However, even if the State violated its *Brady* obligations, relief will be granted only if the misconduct impairs the defendant's right to a fair trial. *Graham*, 764 N.W.2d at 347.

With regard to the blood spatter pictures, Jenkins argues that over 90 pictures were taken of blood spatter at the crime scene six days after the murders and were not disclosed to the defense until the weeks leading up to trial. Jenkins does not claim that he first received the photos on the eve of trial or after the trial started, and the record is not clear as to

precisely how long the photos were in his possession before trial began. Jenkins claims, however, that he received the photos when it was "too late for the Defense to be able to utilize them" because the defense "blood spatter and ballistics experts had come and gone." Jenkins argues that these photos were disclosed too late, preventing him from fully exploiting the fact that the photos conclusively show that there had to be more than one shooter.

On the record presented, we conclude that any late disclosure of the photos did not interfere with Jenkins' right to a fair trial. At the outset, we note that Jenkins does not complain about the timeliness of the State's disclosure of other photos and a videotape of the crime scene taken the morning of the murders. Jenkins used these other photos and the videotape at trial. We also note that, although Jenkins makes the bare assertion that his blood spatter and ballistics experts "had come and gone" by the time the 90 photos were disclosed to him, he does not explain why the photos could not have been transmitted to the experts for their consideration before the trial started or how the photos could have been used differently to produce a different result at trial. More importantly, the record is clear that Jenkins received the photos before trial and was able to use them at trial, offering a number of them as trial exhibits. Further, Jenkins was not precluded from and, in fact, did argue to the jury that the blood-spatter evidence indicated that there was more than one shooter.[2] On this record, we conclude that any late

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[2] We note in passing that the fact that there may have been more than one shooter does not exclude Jenkins as one of those shooters.

disclosure of the 90 photos did not prejudice Jenkins and, therefore, he is not entitled to relief.

Jenkins similarly argues that some of the research from the State's shoeprint expert and the expert's second report were disclosed too late to be used. The State had a shoeprint expert analyze three shoeprints taken from the floor near one of the bodies. The expert generated an initial report, which the State timely disclosed to the defense. Subsequent to that report, the expert conducted additional research and prepared a supplemental report based on that research. The State learned of the additional research and supplemental report on the morning the expert was set to testify and disclosed the report to the defense before the expert testified but failed to disclose the research. As with Jenkins' claim concerning the untimely disclosure of the photos, Jenkins does not explain, and we fail to see, how his trial tactics or the outcome of the trial would have been different had this evidence been available to him earlier. Further, as the district court found when it ruled on this issue while addressing Jenkins's post-trial motion, the shoe expert's research and subsequent report were not exculpatory and the State did not use the evidence at trial. Therefore, we conclude that Jenkins is not entitled to relief on this claim.

In his post-trial motion, Jenkins claimed, as he does here, that the State failed to disclose Mack's threat to have someone kill Curry. Jenkins argued then, as he does now, that the "[f]ailure to timely disclose [the threat] prior to the alternative perpetrator deadline prejudiced [Jenkins]." The district court rejected this claim, finding that the State learned of this evidence at trial, at the same time the defense did. Because we review the district court's factual findings

for clear error, *State v. Buckingham*, 772 N.W.2d 64, 70 (Minn. 2009), and because our careful review of the record satisfies us that the district court's finding is supported by the record, we conclude that it was not clearly erroneous. Therefore, we hold that there was no Rule 9.01 or *Brady* violation.

Jenkins also claims that the State actively interfered with his access to witnesses when it reported Simms to child protection. First, Jenkins contends that the State reported Simms to child protection for the purpose of preventing the defense from having access to the children. This argument is without merit. In denying relief on this part of Jenkins' post-trial motion, the district court found that the State did not report Simms to child protection for the purpose of denying Jenkins' defense team access to the children. That finding is supported by the record. Further, as the district court noted, the State provided the defense contact information for the children and their father, Dwayne Fowler. Jenkins is not entitled to relief on this claim.

We do find merit in Jenkins' claim that the State interfered with Jenkins' access to Simms' children by discouraging Dwayne Fowler from meeting with attorneys for the defense. Under Minnesota Rules of Criminal Procedure, Rule 9.03, subdivision 1, neither counsel for the prosecution or the defense shall advise persons to refrain from discussing the case with opposing counsel or "otherwise impede opposing counsel's investigation of the case." Based on an affidavit from Dwayne Fowler, Jenkins asserts that the State told Fowler not to speak with the defense team and disparaged the defense team when it made certain statements to Fowler that described the defense attorneys as "dangerous and bulldogs" and "hounds"

who would stop at nothing to acquit their client. The district court found that the State's conduct was not improper. We disagree.

In *State v. Mussehl*, we disapproved of letters sent by the prosecution that went beyond advising the witnesses of their right to decline interviews and included a discussion about the defense attorney's obligations, including a statement that "[a] defense attorney in a criminal case is ethically obligated to do everything within his power to defend the person charged with the crime. In practice this means that he will be trying to get his client acquitted." 408 N.W.2d 844, 845 (Minn. 1987). We held those letters to be improper. Here, the prosecutor's statement suggesting that defense counsel would stop at nothing to acquit their client is similar to the statement we held improper in *Mussehl*. Moreover, disparaging defense counsel by calling them "dangerous and bulldogs" and "hounds" has the clear potential to impede defense counsel's ability to investigate the case. Further, to the extent that the State pressured Fowler not to speak with the defense team, that conduct also had the potential to interfere with Jenkins' access to witnesses. Thus, we conclude that the State violated Rule 9.03, subdivision 1.

A defendant is not entitled to any relief, however, unless he is able to show that the violation "prejudicially impeded his investigation of the case." *Mussehl*, 408 N.W.2d at 847. Here, Jenkins has failed to show that the prosecution's conduct impeded his investigation. As the district court found when it ruled on Jenkins' post-trial motion, the State's conduct did not impede Jenkins' investigation because the defense attorneys were able to speak with Simms' two youngest children before the children testified, and "[Dwayne

Fowler] demonstrated his independence when he declined to allow attorneys from either side to interview his children until just before trial." Therefore, Jenkins is not entitled to relief on this claim.

Jenkins further alleges that the State interfered with his access to the gun and bullets by not allowing his expert to have unsupervised access to those items. This was not misconduct. We have never held, and decline to hold here, that a defendant's expert is entitled to unsupervised access to evidence in the State's possession.

Jenkins also argues that the State interfered with his access to the gun when it surreptitiously videotaped his expert's examination of the gun in violation of the district court's discovery order requiring that the State should not be "looking over [the expert's] shoulder." Because Jenkins does not explain how the State's act of videotaping his expert's examination of the gun impeded his investigation or otherwise resulted in prejudice to him, we conclude that he is not entitled to any relief on this claim.

Finally, we address Jenkins' claims that he is entitled to an acquittal because the State destroyed material evidence, thus denying him a fair trial. A defendant's right to due process of law is implicated when the State loses, destroys, or otherwise fails to preserve material evidence. *State v. Krosch*, 642 N.W.2d 713, 718 (Minn. 2002) (citing *Arizona v. Youngblood*, 488 U.S. 51, 56-58 (1988), and *California v. Trombetta*, 467 U.S. 479, 486-91 (1984)). The duty to preserve evidence only applies to evidence that is actually collected during the investigation of the crime because "it would be illogical" to require the State to preserve evidence it does not possess. *Krosch*, 642 N.W.2d at 718. The failure to preserve potentially

useful evidence that is actually collected during a criminal investigation does not constitute a denial of due process unless the defendant shows bad faith on the part of the police. *State v. Bailey*, 677 N.W.2d 380, 393 (Minn. 2004) (citing *Youngblood*, 488 U.S. at 58); *see also Illinois v. Fisher*, 540 U.S. 544, 547-48 (2004). Thus, when analyzing a destruction-of-evidence claim, "we consider whether the destruction was intentional and whether the exculpatory value of the lost or destroyed evidence was apparent and material." *State v. McDonough*, 631 N.W.2d 373, 387 (Minn. 2001) (explaining that State's intentional release of the motor vehicle in which the victims were killed did not violate McDonough's right to due process because McDonough failed to show that the evidence had exculpatory value); *see also State v. Friend*, 493 N.W.2d 540, 545 (Minn. 1992). When the evidence is destroyed as a result of intentional conduct, we consider whether there is any evidence that the State destroyed or released the evidence " 'to avoid discovery of evidence beneficial to the defense.' " *Bailey*, 677 N.W.2d at 393 (quoting *State v. Koehler*, 312 N.W.2d 108, 109 (Minn. 1981)).

Jenkins first claims that the police failed to collect GPS data from the taxicab that allegedly transported Jenkins after the murders, failed to collect a wallet at the crime scene, failed to collect a pair of shoes visible in the police photos of the crime scene, and "did nothing to trap any civilian shoes or impressions" from the crime scene. Because the police had no obligation to collect any of this evidence, these claims necessarily fail.

Jenkins also argues that the police improperly released Porter's car to Porter's brother before his defense team had a chance to examine it for evidence. This claim also fails. Although the police looked in it

the night of the murders to see if Porter's cell phone was inside, Jenkins does not allege and the record does not indicate that the car played any role in the murders. He does allege that a cell phone charger found in the car could have been exculpatory if it did not match the cell phone found in Jenkins room. However, the phone number provided by Porter's brother matched the phone number of the cell phone found in Jenkins room, is the same number of the phone that Porter used to call his brother earlier in the evening, and is the same number from which the person who ordered the taxicab for 1714 Broadway called. Thus, even if the cell phone charger in the car did not match the cell phone found in Jenkins room, the evidence would not have been exculpatory.

Next, Jenkins challenges what he claims to be the State's destruction of Jenkins' pants, which the State cut into sections in order to test the blood found on them. Jenkins asserts that the sectioning of the pants prevented him from showing that the police planted the blood. Because the record indicates that pants were photographed extensively before the bloody sections were cut for testing and all of the samples and the test results were made available to the defense, we conclude that blood evidence on the pants was properly preserved and turned over to the defense.

Jenkins also claims that the State failed to meet its obligation to preserve the blood evidence on the gun. Jenkins argues that removing the blood from the gun prevented the defense from showing that the blood spatter patterns on the gun found in Jenkins' room proved that it could not have been the murder weapon. Again, we disagree. The State photographed the blood evidence as it was found on the gun and made those photographs, along with the results of its DNA testing

of that blood evidence, available to Jenkins. In addition, swabs of the blood evidence from the gun were preserved and made available to Jenkins so that he could conduct his own DNA tests. Because photographs of the blood evidence on the gun were made available to Jenkins, along with the results of the State's DNA testing and swabs of the blood evidence, we conclude that Jenkins' failure-to-preserve claim has no merit.

Jenkins further argues that the State destroyed evidence when, for purposes of testing, the police cleaned three bullets and a bullet fragment connected to the victims and the crime scene, denying him the opportunity to have his own expert test the bullets in their original state. He claims that this destruction of evidence prevented him from showing that the police planted the gun, the bullets, and the bullet fragment.

The record indicates that one of the bullets was recovered from inside the shirt of one of the victims by the medical examiner's office during the victim's autopsy, and that a bullet fragment was removed from the body of one of the victims during his autopsy. As is the practice of the medical examiner's office, the bullet and the bullet fragment were washed, placed in sealed envelopes marked for identification purposes, and turned over to the police investigators. The other two bullets were recovered by the police at the scene, property inventoried, and retained by the police. One of the bullets was recovered from the kitchen floor and the other from a windowsill in the kitchen. All three bullets and the bullet fragment were given to the BCA for further testing to determine if they were fired from the gun recovered from Jenkins' room. Because biological material such as blood, human flesh, and bone cause bullets to deteriorate, it is the BCA's practice to

wash bullets it receives from the police for testing in a bleach solution. This practice was followed with the three bullets and the bullet fragment. Once cleaned, the BCA conducted comparison tests to determine whether the bullets and the fragment were fired by the gun found in Jenkins' room. The results of those tests were inconclusive, that is, the three bullets and the bullet fragment could not be directly linked to the gun nor could they be conclusively excluded as having been fired from the gun.

We hold that Jenkins has not shown bad faith on the part of the medical examiner or the BCA in cleaning the bullets. Further, there is no evidence that the bullets were cleaned "to avoid discovery of evidence beneficial to the defense." *See Bailey*, 677 N.W.2d at 393. In fact, the record indicates that the medical examiner and the BCA followed their standard practice in the handling of these bullets. Further, we note that even if we were to conclude that Jenkins had shown bad faith, we would also conclude that the failure to preserve biological material from the bullets was harmless beyond a reasonable doubt. *See Cannady*, 727 N.W.2d 403, 408-09 (Minn. 2007) (explaining that constitutional error is not reversible error when the error is harmless beyond a reasonable doubt); *State v. Richardson*, 670 N.W.2d 267, 279 (Minn. 2003) (explaining that if the verdict is surely unattributable to the error, then the error is harmless beyond a reasonable doubt). In light of the direct link between Jenkins and the gun, and the victims and the gun, any failure to preserve biological material from the bullets and bullet fragment could not have prejudiced Jenkins. The gun itself was directly linked to Jenkins. It was found in his room with his fingerprint on it. The gun was also directly linked to one of the victims. Porter's

blood was on the gun when it was seized from Jenkins' room. Thus, the connection between the gun and victims did not depend on the bullets and bullet fragment. In addition, the bullets and bullet fragment could not have played a significant role in establishing the connection between the gun and the victims because the ballistic testing was inconclusive. Based on the record in this case, the verdict was surely unattributable the State's failure to preserve the biological material that was on the bullets and bullet fragment.

In summary, we hold that Jenkins has failed to establish any misconduct on the part of the State entitling him to any relief.

VIII.

Jenkins next argues the district court erred in denying his request for a new trial based on newly discovered evidence. Jenkins claims that information he learned from D.F.'s trial testimony implicating "Mooki" as the person who shot Curry and Porter constitutes newly discovered evidence. We have held that a defendant's new trial motion based on newly discovered evidence should be granted if: "(1) the evidence was not known to him or his counsel at the time of trial; (2) the failure to learn of the new evidence was not because of lack of diligence; (3) the evidence is material and is not impeaching, cumulative, or doubtful; and (4) the evidence is likely to produce an acquittal or more favorable result for the defendant." *State v. Fort*, 768 N.W.2d 335, 344 (Minn. 2009).

Jenkins' assertion that he first learned of the evidence implicating "Mooki" as the shooter from D.F.'s trial testimony causes this claim to fail because he cannot establish that "the evidence was not known to him during the time of trial." In addition to "Mooki"

being implicated in D.F.'s testimony, the district court noted in its memorandum and order denying Jenkins' new trial motion that "Mr. Fowler testified that he had seen 'Mooki' in a car outside 2922 Dupont several hours after the murders." Through Ms. Clark's affidavit, we learn for the first time that Mr. Fowler actually told her *during the trial* that "word on the street" was that Mooki and Wright had committed the murders. Yet, as the district court noted:

> Testimony in this case ended early on March 21, 2008. The defendant had the balance of that day and a weekend to investigate Mr. Fowler's claim that Mooki and Wright were involved in the murders. Moreover, the defense could have asked for a continuance to further investigate these issues. Instead, the defense did not even disclose this rumored information to the Court or the State. The defense never sought a recess to explore their theories further. The record clearly demonstrates that this information was known to the defense at trial and they chose not to pursue it. (Footnote omitted).

Because the record supports the district court's finding that Jenkins knew about the allegations against "Mooki" before the end of trial but did not seek a recess to explore Mooki's involvement in the murders or otherwise pursue the theory that Mooki was the shooter, we hold that the district court did not err when it denied Jenkins' new trial motion based on newly discovered evidence.

IX.

Jenkins' final argument is that the district court violated Minn. Stat. § 609.035, subd. 1, when the court

sentenced him to two consecutive life terms. This argument is wholly without merit. We have consistently held that the imposition of consecutive sentences for crimes involving multiple victims is permissible. *See, e.g.*, *State v. McLaughlin*, 725 N.W.2d 703, 717 (Minn. 2007) (affirming two consecutive life sentences for the murder of two students); *State v. Warren*, 592 N.W.2d 440, 452 (Minn. 1999) (holding that trial court abused its discretion in imposing concurrent sentences, as opposed to consecutive sentences, upon defendant who shot and killed three victims at close range); *State v. Brom*, 463 N.W.2d 758, 765 (Minn. 1990) (holding that three consecutive life sentences were commensurate of defendant's murdering of four family members); *Bangert v. State*, 282 N.W.2d 540, 547 (Minn. 1979) (affirming two consecutive life sentences for a double homicide).

Affirmed.

STATE OF MINNESOTA
DISTRICT COURT

COUNTY OF HENNEPIN
FOURTH JUDICIAL DISTRICT
CRIMINAL DIVISION

File Number 27CR07-0234102

State of Minnesota,
Plaintiff,

vs.

Philander Dermont Jenkins,
Defendant.

ORDER AND MEMORANDUM RULING ON DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

An Indictment charges Defendant Jenkins with First Degree Murder of Lorenzo Porter and Eugene Curry.

Defendant moves to suppress a gun found "in plain view incident to an arrest," the search of the crime scene, the search of defendant's room, statements made to the police, and identifications by witnesses.

FACTS

On March 14, 2007, Cassandra Simms called 911 to report that a shooting had taken place in her home located at 2922 Dupont Avenue North, Minneapolis,

Minnesota. Upon arrival, the police entered the residence and found the bodies of Lorenzo Porter and Eugene Curry. Mr. Porter was found lying on the kitchen floor. He had a single bullet wound to his head which had been fired at close range. Eugene Curry was found lying in the doorway of a bedroom he occupied. He had been shot at least three times. Both men were dead when police arrived.

Police immediately noticed that Lorenzo Porter had a holster for a cell phone on his belt but that the cell phone was missing. Sgt. Charles Adams illuminated the interior of Mr. Porter's car and observed that the cell phone charger was in place but that the cell phone was not in the car. Lorenzo Porter's brother Lawrence stated he had last spoken with the victim Porter on the cell phone at approximately 10:30 p.m. on March 13, 2007. Lawrence Porter and Ms. Simms provided police with the cell phone number of the victim's phone.

Sgt. Matthew Wente served an exigent circumstances request upon Sprint Communications requesting the call detail for Porter's cell phone. Information provided by Sprint revealed that Mr. Porter's cell phone had been used two hours after his death. The phone had been used to call Blue and White Cab at approximately 4:00 a.m. on March 14, 2007. Police learned from the night manager at Blue and White Cab that in response to a request called in from Porter's cell phone, a cab had picked up a male and female from 1714 Broadway and had dropped them off at 18 1/2 and Quincy Avenue N.E.

Investigators learned that a man named "Phil" had been at the residence where the murder took place

on the evening of March 13, 2007. The clothing he was wearing matched the description of the clothing worn by the man seen leaving immediately after the murders. Neighbor Convona Sims told police that a man she knew as "Kill" or "Phil" had been shot a few days earlier and that her sister had reported the incident to the police. Ms. Sims identified the defendant from a confirmatory photo and also told police that the defendant had attempted to sell her brother a handgun just days before the murders. Patricia Walker, one of the residents at 2922 Dupont Avenue North, also identified a confirmatory photo of the defendant as the person she knew as "Phil."

Sgt. Ann Kjos researched Minneapolis police reports and found a report from March 12, 2007 in which the defendant was the victim of a shooting. In that report, the defendant told police he lived at 1811 Quincy Avenue N.E., a short distance from the drop-off point described by the manager from Blue and White Cab. Police also determined that the defendant had a warrant for his arrest from Crow Wing County.

Based upon this investigation, the Violent Crimes Apprehension Team (VCAT) was dispatched to arrest the defendant on the warrant. The rooming house at 1811 Quincy Avenue N.E. was surrounded by police and officers knocked at the front exterior door. The defendant responded, opening the door. When police asked him his name, he stated he was "Tyrone." The defendant later volunteered that the person they were looking for was a man named "Tyrone" who lived on the second floor. When confronted with his earlier claim that he was "Tyrone," the defendant told police that his name was "Derrick." Police officers matched

him to known photographs of Philander Jenkins and placed him under arrest.

Sgt. Wente testified that the defendant had no shoes or jacket on when he came to the door. The defendant requested permission to re-enter his room to obtain shoes and a jacket. He also told police that a woman was inside the room. Officer Ann Martin entered the room to standby while the woman, Lillian Blount, got dressed. The defendant was then permitted to enter the room with police to obtain shoes and a jacket. Police transported both the defendant and Ms. Blount to the Homicide office for questioning.

The VCAT officers froze the room until a search warrant arrived. While standing in the center of the room, Sgt. Wente observed a portion of a handgun underneath a pile of clothing. He did not move clothing to see this item nor did he touch the gun after observing it. Sgt. Wente alerted homicide investigators to his observation of the gun. He was released from the scene to prepare reports and recover the cab that had transported the defendant and Ms. Blount. Officer Danny Hicks and his partner remained at 1811 Quincy Avenue N.E. until detectives arrived with the warrant.

In an interview with Ms. Blount, she confirmed that the defendant had used a cell phone to call the cab to pick them up. She stated that the cab transported the defendant and herself to the defendant's residence at Quincy Avenue.

Sgt. Klund and Sgt. Hauglid gave the defendant a Miranda advisory and asked if he would talk with them. They terminated the interview when the

defendant requested counsel. While Sgt. Klund was in the interview room with the defendant, however, he noted that the defendant's clothing was stained with blood. The condition of his clothing was preserved with photographs and the clothing was seized from the defendant.

Sgt. Kjos prepared a search warrant for 1811 Quincy Avenue N.E., Apt. 1 after receiving information from Sgt. Hauglid, Sgt. Klund and her partner Sgt. Porras. The warrant was reviewed and signed by the Honorable Judge Todd Barnette. Sgt. Kjos testified that the Bureau of Identification photographed the apartment prior to execution of the search warrant. She then conducted the search, recovering evidence that included blood-stained clothing, cocaine, cash, cell phones, and a gun. On March 17, 2007, Sgt. Klund met with Walter Mack Hall, a man the defendant had spent time with during the early morning hours of March 14, 2007. Mr. Hall viewed a photo display and positively identified a photograph of the defendant as the person who had been at his residence earlier that morning.

THE VALIDITY OF THE BENCH WARRANT ARREST

A bench warrant is a court order directing police officers to arrest the subject of the warrant. The validity of bench warrants was addressed most recently in State v. Mohs, A-06-199, 2008 Minn. LEXIS 7 (Minn. 1/10/08). In Mohs, the court issued a bench warrant when Mohs failed to appear at a scheduled court appearance. The Court issued a "body only" warrant, declining to set bail. Mohs challenged the denial of bail as well as the constitutionality of the warrant. The

Supreme Court upheld the use of a "body only" warrant, noting that Minn.R.Cr.P. Rule 6.03, Subd. 1b. permits courts to issue bench warrants without setting bail on the face of the warrant.

In the instant case, Crow Wing County issued a bench warrant for the defendant when he failed to appear for a court appearance. The bench warrant directed officers to arrest the defendant. Defendant appears to argue that somehow a bench warrant is on different footing than an arrest warrant issued pursuant to Minn.R.Cr.P. Rule 3. The Court finds no authority for this position. The arrest pursuant to a valid bench warrant is a lawful arrest and evidence properly recovered as a result of that arrest is admissible at trial.

THE IDENTIFICATION PROCEDURES

To be admissible, the procedure used for the witness to identify the defendant must not have been impermissibly suggestive. Simmons v. United States, 390 U.S. 377, 384 (1968). The purpose of excluding identification evidence where the identification process was impermissibly suggestive is to protect the defendant from the likelihood of misidentification. Neil v. Biggers, 409 U.S. 188, 198 (1972). One-person "show-ups" are not per se unnecessarily suggestive. State v. Taylor, 594 N.W.2d 158, 161 (Minn. 1999). The right to counsel does not apply to photograph or mug shot displays. United States v. Ash, 93 S.Ct. 2568, 413 U.S. 300 (1973) (even post-charge, photographic display is not a "critical stage" of adversary process requiring right to have defense counsel present).

Minnesota courts apply a two-part test to determine whether the identification process was tainted by official misconduct and thereby impermissibly suggestive. Id. at 161; State v. Ostrem, 535 N.W.2d 916, 921 (Minn. 1995); State v. Spann, 287 N.W.2d 406, 407 (Minn. 1979). "The first inquiry focuses on whether the procedure was unnecessarily suggestive. Included in that inquiry is "whether the defendant was unfairly singled out for identification." ...Ultimately the concern is whether the procedure used by the police influenced the witness" identification of the defendant." Taylor, 594 N.W.2d at 161 (emphasis in original). If the first prong shows that the process was impermissibly suggestive, the court then reviews the totality of the circumstances to determine whether "the witness" identification has an adequate independent origin [and] considered to be reliable despite the suggestive procedure." Id.

Though one-person photo or show-up identifications are often held impermissibly suggestive, Minnesota courts have previously held that "an unnecessarily suggestive identification procedure did not cause a "substantial likelihood of misidentification" [where the identification] was merely confirmatory." Id. (emphasis added); State v. Darveaux, 318 N.W.2d 44, 47 (Minn. 1982). The two-part test is not applicable in cases where the identification or show-up was merely confirmatory because the two-part test is premised on the assumption that the witnesses and perpetrator are strangers.

In this case, police showed confirmatory photos to Convona Sims, Cassandra Simms, and Patricia Walker. Each of these witnesses were acquainted with

the defendant and had seen him on a regular basis. The defendant was a regular visitor to 2922 Dupont Avenue North where Ms. Sims occupied the second floor apartment and Ms. Simms and Ms. Walker lived in the first floor unit. The defendant knew Convona Sims and, in her presence, attempted to sell a gun to her brother. Showing a confirmatory photo to these witnesses did not result in an impermissibly suggestive procedure nor did it create a likelihood for misidentification. The identifications of Ms. Walker and Ms. Sims were properly obtained and the motion to suppress that identification is denied.

Police presented photographic displays to witnesses Walter "Mack" Hall and cab driver Frank Hammond. Hall identified the photo of the defendant as the person who came to his apartment in the early mornings hours of March 14, 2007 and used a cell phone to call for a cab. The photographic lineup shown to Hall was not impermissibly suggestive and his identification was not the product of a tainted identification procedure. Arguably, under these facts, Hall was also well acquainted with the defendant and a confirmatory identification procedure would also have been permissible. Hall's identification of the defendant should be admissible at trial.

The defense argues that Hall's identification at the pretrial hearing was weak. This may be true; but the issue here is whether or not there is a constitutional violation in the procedure used and there was not. The motion to suppress Hall's identification is denied.

THE SEARCH OF DEFENDANT'S ROOM AT 1811 QUINCY N.E.

The Fourth Amendment protects citizens from unreasonable searches and seizures. Generally, police officers must obtain a search warrant from a neutral and detached magistrate when conducting a search of a place where a citizen has a reasonable expectation of privacy. The U.S. Supreme Court has recognized several exceptions to the requirement that police obtain a warrant. A search warrant is not required when police officers proceed with the consent of an occupant or under exigent circumstances supported by probable cause.

Under the plain view exception to the warrant requirement, police may seize evidence in plain view without a warrant when the initial intrusion which brought the item into plain view is justified. Arizona v. Hicks, 480 U.S. 321, 326 (1987); State v. Hummel, 483 N.W.2d 68, 73 (Minn. 1992). Once an officer has observed an object in "plain view," there is no longer a privacy right in the object, but the defendant's remaining interests in the object are merely those of possession and ownership. Coolidge v. New Hampshire, 403 U.S. 443 (1971). Under the plain view doctrine, the police may seize an object they believe to be the fruit or instrumentality of a crime provided they are legitimately in the position from which they view the object, have a lawful right of access to the object, and the object's incriminating nature is immediately apparent. Minnesota v. Dickerson, 508 U.S. 366, 375 (1993); State v. Lembke, 509 N.W.2d 182, 184 (Minn. App. 1992). Thus when an officer is lawfully present in a home, the officer may seize evidence which is in plain

view. State v. Bunce, 669 N.W.2d 394, 399 (Minn. App. 2003).

An object's "incriminating character is immediately apparent" when the police have probable cause to believe that the object in plain view is contraband without conducting further search of the object. Dickerson, 508 U.S. at 375; Lembke, 509 N.W.2d at 184. In order to establish that probable cause exists to seize an item found in plain view, the facts available to the officer must support a finding that a person of reasonable caution would believe that it "may be contraband or stolen property or useful as evidence of crime." State v. Zanter, 535 N.W.2d 624, 632 (Minn. 1995). In making such a determination, "the police may consider such things as any background information they have which casts light on the nature of the property." Id.

In this case, the police went to 1811 Quincy N.E. to arrest the defendant on the Crow Wing County bench warrant. The defendant was also the suspect in the double homicide that occurred earlier that morning. When police knocked on the exterior building door, the defendant opened the door. The police asked the defendant his name and he provided false information. When the police compared the defendant to a photo of the defendant, they determined that he was Philander Jenkins and placed him under arrest. Sgt. Wente testified that the defendant requested permission to re-enter his room to retrieve his coat and shoes. Since he was in custody, police accompanied him inside the room to get these items. Lillian Blount was inside the room and she was instructed to get dressed. Ms. Blount testified that she observed officers "eye-searching" the

room, indicating that they did not move anything but only looked around the room. Officers froze the scene while waiting for detectives to prepare a search warrant. While standing in the middle of the room, Sgt. Wente observed a portion of a handgun protruding from underneath a pile of clothing. He was not required to move any items to see the gun. Sgt. Wente then passed this information along to the homicide detectives who were preparing a search warrant.

Arguably, Sgt. Wente could have seized the gun upon first observing it because he was in a place where he was lawfully entitled to be. The defendant asked to go into his room to get a coat and shoes after he was in custody. Implicit in that request is that the police will accompany him inside the room. He could hardly have expected that officers would send him inside his room to retrieve these things by himself. Sgt. Wente did not recover the gun, however, because the plan was to obtain a search warrant to search for evidence of the homicide. Instead, officers stood by awaiting the warrant before conducting the search for evidence of the homicide.

When a search warrant is presented to the court, a judge is required to review a search warrant application and arrive at a probable cause determination in a common sense and practical manner. State v. Eggler, 372 N.W.2d 12, 15 (Minn. App. 1985), rev. denied (Minn. Sept. 19, 1985) (citing Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983)). In establishing probable cause, police officers may rely on their training and experience to draw inferences in affidavits. State v. Richardson, 514 N.W.2d 573, 579 (Minn. App. 1994); State v. Skoog,

351 N.W.2d 380, 381 (Minn. App. 1984). Probable cause is sufficient if the affidavit contains competent evidence to lead a reasonably prudent person to believe there is a basis for the search. State v. Bagley, 286 Minn. 180, 192, 175 N.W.2d 448, 456 (1970).

To determine whether the issuing court had a substantial basis for finding probable cause, the reviewing court must apply a "totality of the circumstances" test. State v. Wiley, 366 N.W.2d 265, 268 (Minn. 1985). That test provides in pertinent part:

> [The] issuing judge "is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."

State v. Zanter, 535 N.W.2d 624, 633 (Minn. 1995), appeal denied (Sept. 20, 1995) (quoting Illinois v. Gates, 462 U.S. at 238).

A reviewing court must pay "great deference" to the issuing court's determination of probable cause. Illinois v. Gates, 462 U.S. at 288; State v. Jannetta, 355 N.W.2d 189, 194 (Minn. App. 1984), appeal denied (Minn. Jan. 14, 1985). Doubtful or marginal cases should be "largely determined by the preference to be accorded to warrants." State v. Albrecht, 465 N.W.2d 107, 109 (Minn. App. 1991) (quoting Massachusetts v. Upton, 466 U.S. 727, 734, 104 S.Ct. 2085, 2089, 80

L.Ed.2d 721 (1984)); State v. Rochefort, 631 N.W.2d 802, 805 (Minn. 2001).

The search warrant obtained for 1811 Quincy N.E. is supported by probable cause. The affidavit set forth the facts and circumstances surrounding the homicide including: (1) two men were shot to death; (2) decedent Porter's cell phone was missing; (3) the defendant was inside the victim's residence prior to the shooting; (4) a man used the victim's cell phone two hours after his death; (5) the cell phone was used to call Blue and White cab to transport a male and female from 1700 W. Broadway to 18th and Quincy; (6) the defendant was arrested at 1811 Quincy N.E. and was with a female companion at the time of his arrest; (7) the female companion told police that the defendant used a cell phone to call a Blue and White cab to pick them up from 1700 Broadway; (8) the defendant had suspected blood on his clothing; (9) police observed a handgun inside the defendant's room; and (10) police observed two cell phones in the defendant's room. Clearly these facts are sufficient to establish probable cause to believe that a crime (two murders) had been committed and that there would be evidence of that crime in the defendant's room.

Defendant argues that the Court should excise information about the gun and the cell phones observed in plain view, contesting the officers right to be present in the defendant's room awaiting the search warrant. Even if the defendant were correct in this argument, however, the other facts in the warrant clearly establish probable cause to search. There are no constitutional errors in the recovery of evidence from

defendant's room and the motion to suppress it is denied.

SEARCH WHICH LED TO RECOVERY OF DEFENDANT'S CLOTHING

Police officers lawfully arrested Defendant pursuant to a bench warrant. In addition to the bench warrant as a basis to arrest Defendant, there was also probable cause to believe that Defendant committed the murders. In this respect, a court is to apply an objective standard for determining the lawfulness of an arrest or search by taking into account the totality of the circumstances to determine whether or not police had probable cause. State v. Hawkins, 622 N.W.2d 576 (Minn. App. 2001) (arrest and search incident to a loitering stop legal because by an objective standard, police officers had probable cause to arrest the suspect for felony narcotic violations). When probable cause exists, police may arrest a felony suspect and conduct a warrantless search incident to arrest. Id. at 580 (citing State v. Walker, 584 N.W.2d 763 (Minn. 1988).

It is well-established that the police have unqualified authority to search the person of an arrestee. United States v Robinson, 414 U.S. 218, 225 (1973). "In the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment." Id. at 235. The rule established in Robinson is a bright line, and permits a full search of a person subjected to custodial arrest without the need to articulate additional need or justification. State v. Rodewald, 376 N.W.2d 416, 419-20 (Minn. 1985).

A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search. Id. at 420 (quoting Robinson, 414 U.S. at 235). Evidence obtained as a result of a search incident to arrest may be used to identify the arrestee, and may be introduced against the arrestee in a criminal trial. See State v. Scroggins, 297 Minn. 144, 147 (1973).

When the defendant was brought to the homicide office for questioning he was lawfully arrested, police observed what appeared to be blood on his pants and other items of clothing. Police properly seized the defendant's clothing in a search incident to his arrest. Subsequent testing of that evidence matched the victim's blood on the defendant's clothing. The motions to suppress the defendant's clothing and the tests are denied.

POLICE SEARCH OF THE CRIME SCENE

To be constitutional, the warrantless search of a home must fall under an established exception to the warrant requirement. State v. Hummel, 483 N.W.2d 68, 72 (Minn. 1992). One such exception is consent by the owner or a third party with common authority over the premises. Id. at 72-73. To be valid, consent only needs to be voluntary. Id. at 73. It need not be knowing or intelligent, but must be more than mere submission to a show of authority. Id. Knowledge of the right to refuse is not a prerequisite for consent to be voluntary. Id. Failure to object to a search is

evidence of consent. State v. Purdy, 153 N.W.2d 254, 260 (Minn. 1967). Further, in order to have standing to object to a police search, the defendant must have an expectation of privacy in the place to be searched.

Cassandra Simms and Patricia Walker lived at 2922 Dupont Avenue North. After the murders, Ms. Simms summoned the police to the address through a 911 call. Upon arrival, officers entered the home to find victims Lorenzo Porter and Eugene Curry shot to death. Ms. Simms properly consented to the search of her home and to a re-entry by Sgt. Klund for a second search. Moreover, this defendant has no standing to object to a search at 2922 Dupont Avenue North because he was not a resident and he had no expectation of privacy.

The motion to suppress evidence seized at the crime scene is denied.

DEFENDANT'S STATEMENTS TO POLICE AT 1811 QUINCY N.E.

Individuals must be given a Miranda warning before being subjected to custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 444 (1966). Custodial interrogation has been defined by the Supreme Court to mean "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Oregon v. Mathiason, 429 U.S. 492, 494 (1977). Interrogation includes express questioning as well as any words "police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291,

301 (1980). Statements from a defendant that were not elicited by custodial interrogation are considered spontaneous and voluntary. State of Minnesota, City of Spring Lake Park v. Seekon, 392 N.W.2d 624, 627 (Minn. App. 1986). If a defendant's statements were spontaneous and voluntary, even though made in custody, they need not be suppressed. Id.

In the instant case, the defendant voluntarily told police that his name was "Tyrone"; he then told police that the person they were looking for was Tyrone and that he lived upstairs; and finally he stated that his name was Derrick. These statements were all made voluntarily and before he was in police custody. No Miranda warning is required until a suspect is in custody. The motion to suppress these statements is denied.

The motions of the defendant to suppress evidence are denied.

IT IS SO ORDERED.

BY THE COURT:

Dated:

Thor Anderson
Judge of District Court

12/7/2008
STATE OF MINNESOTA
DISTRICT COURT

COUNTY OF HENNEPIN
FOURTH JUDICIAL DISTRICT
CRIMINAL DIVISION

Court File No. 27-CR-07023102

State of Minnesota,
Plaintiff,

vs.

Philander Dermont Jenkins,
Defendant.

MEMORANDUM AND ORDER

The defendant was convicted of four counts of first degree murder: two counts of premeditated murder and two counts of murder while committing an aggravated robbery. He has moved this Court for a new trial pursuant to Minn.R.Cr.P, Rule 26.04, Subd. 1; for a judgment of acquittal pursuant to Minn.R.Cr.P. Rules 26.03, Subd. 17(3) and 26.04 Subd. 1(7); and/or to vacate judgment pursuant to Minn.R.Cr.P. Rule 26.04, Subd. 2.

The evidence at trial supporting the verdicts was as follows:

a.m. on March 14, 2007 Cassandra Simms and Patricia *** the sound of gunshots from inside their home at 2922children, Sandra Fowler, then eleven-years-old, and five-****and Jasmond Fowler, were also in the ome sleeping***. The women brought the children into the hallway to safety. Ms. Simms and Ms. Walker then watched as the shooter, dressed in a black hoodie and jeans, walked out the front door. The children were brought to a neighbor's home and Cassandra Simms called 911 at 2:33 a.m.

Responding officers found the body of Lorenzo Porter lying inside the kitchen, wedged between a refrigerator and a kitchen chair. He had been shot once to the head. Adjacent to his body were distinctive footprints in blood. Police observed crack cocaine and a scale on the kitchen table. Mr. Porter's pants had been pulled down and he had an empty cell phone case attached to his belt, Officers proceeded to the northeast bedroom and observed the body of Eugene Curry in the doorway. Mr. Curry had multiple gunshot wounds including wounds to his face, hand, chest and head. Mr. Curry's pants were also pulled down. Officers testified that the circumstances appeared to indicate that both men were killed during a robbery.

Sgt. Matt Wente was provided with the number for Mr. Porter's cell phone and he began efforts to track it through subpoenaed cell tower records. Sgt. Wente learned that multiply calls had been made from the cell phone after Mr. Porter was murdered. At 3:55 a.m., a call was placed from Mr. Porter's phone to Blue and White Taxi. Management at Blue and White Taxi told police that in response to the call, a taxi had been dispatched to 1704 West Broadway. The driver picked

up a man and a woman and transported them to 18th and Quincy N.E., Minneapolis.

Sgt. Ann Kjos investigated a lead that a man named "Phil" had been with the victims during the evening hours of March 13, 2007. Convona Sims, a resident of the upstairs duplex at 2922 Dupont Avenue North, told officers that the person she knew as "Phil" or "Kill" had been shot in the past few days. Sgt. Kjos ran police reports looking for a man named Phil who had reported being a victim of a shooting in the days immediately preceding the murder. She learned the defendant reported a gunshot wound to his leg on March 12, 2007. The defendant gave police his address as 1811 Quincy N.E.

Police learned that the defendant had a bench warrant for his arrest. The Violent Crimes Apprehension Team (VCAT) went to 1811 Quincy N.E. to arrest the defendant. When police knocked on the building door, the defendant answered. He lied to police about his name but was arrested when police recognized him as Philander Jenkins. Police found a woman named Lillian Blount inside his room. The room was frozen for a search pursuant to a warrant.

When police searched the defendant's room, they recovered a bloody gun, money, crack cocaine and two cell phones. They would later learn that forensic DNA testing revealed one sample of blood on the gun was a match to Eugene Curry. Police also later learned that one of the cell phones recovered was in fact the phone belonging to victim Lorenzo Porter.

A visual examination of the defendant's clothing at the time of his arrest revealed multiple blood stains on his jeans. His jeans, jacket, black hoodie and shoes were recovered during the arrest process. DNA testing revealed that some of the bloodstains on the defendant's jeans were a match to Eugene Curry. The shoes recovered from the defendant were "Jordans," a brand manufactured by Nike. Footwear impressions from the defendant's shoes matched the tread pattern of footprints in blood next to Lorenzo Porter's body. Unique characteristics of the defendant's shoes could not be determined largely because, according to the testimony of Forensic Scientist Don Melander, blood would likely have filled any unique wear patterns visible in the footprint left at the scene.

Physical evidence recovered from the defendant's room was analyzed for possible latent fingerprints. Police recovered the defendant's thumbprint on the cylinder of the handgun. Police also recovered a different portion of the defendant's thumbprint on the menu button of Mr. Porter's cell phone. Separate testing revealed that the defendant could not be excluded as a possible contributor to a DNA profile developed from the grip of the handgun. Forensic Scientist Alyssa Bance testified that 99.98% of persons in the world could be eliminated as contributors.

Lillian Blount testified that the defendant arrived at 1704 West Broadway after bar closing, estimating his time of arrival as approximately 3:00 a.m. She stated that he had money and drugs and that she agreed_to accompany him to his room at 1811 Quincy N.E. She testified that she was paid $50 for "indulging" with Jenkins. Although she testified that she did not see a

gun in his room, she testified that she was high and that she it was possible that "Metal could see me and I probably didn't see it."

At trial, Cassandra Simms identified the defendant as the person she saw leaving the home immediately after the shooing, Patricia Walker testified that she saw two persons leaving. She heard the defendant's voice stating: "come on cuz....fuck them niggers, let's go." Corroborating these identifications was testimony from Nova Meeks, Maurice Vasser, and Karenlu Kendall that the defendant was with the victims on the night preceding the murder. Ms. Meeks and Mr. Vasser testified that the defendant had no money and needed to borrow money to make a bet in a card game. Ms. Meeks testified that the defendant left her home with the victims at about midnight, only two and one half hours before the murders. In addition, Convona Sims told police that she had seen the defendant with the same gun when he tried to sell the gun to her brother in the days preceding the murder. Walter "Mack" Hall testified that the defendant had a gun in his possession immediately after the murders when he stopped at 1704 West Broadway.

ISSUES RAISED BY DEFENDANT IN HIS MOTION FOR A NEW TRIAL

Minn.R.Cr.Pro. Rule 26.04, Subd. 1(1) provides, in pertinent part, that the Court on written motion may grant a new trial upon the following grounds;

1. If required in the interests of justice;

2. Irregularity in the proceedings of the court, jury, or on the part of the prosecution, or any

order or abuse of discretion, whereby the defendant was deprived of a fair trial;

3. Misconduct of the jury or prosecution;

4. Accident or surprise which could not have been prevented by ordinary prudence;

5. Material evidence, newly discovered, which with reasonable diligence could not have been found and produced at the trial; and

6. Errors of law occurring at the trial, and objected to at the time or, if no objection is required by these rules, assigned in the motion;

Defendant cites these six grounds as the basis for his motion for new trial.

A new trial will be granted on grounds of newly discovered evidence only if the evidence (1) was not known to the defendant or his counsel at the time of trial; (2) could not have been discovered through due diligence before trial; (3) is not cumulative, impeaching, or doubtful; and (4) would probably produce an acquittal or a more favorable result. Rainer v, State 566 N.W. 2d 692, 695 (Minn. 1997).

1. efendant Claims He has Identified "Real Perpetrators."

The defendant claims that "Mooki" and a man named Marquaz Wright are the actual perpetrators of the murders of Mr. Curry and Mr. Porter. The basis for this claim appears to be a combination of information

offered by Duane Fowler, and the Fowler children (who testified at trial).

Defense counsel Clark states in her affidavit that she interviewed Mr. Fowler during a trial recess. She states that Mr. Fowler told her that "word on the street" was that Mooki and Marquaz Wright had committed the murder.[1] Mr. Fowler provided nothing beyond mere rumor that either of these individuals was involved in the murders. Diamond Fowler testified at trial that she saw a man named Mooki leaving the house after the shooting. She described him wearing a grey jacket. Diamond Fowler also testified, of course, that "Phil" had killed both Mr. Curry and Mr. Porter.

In a post-trial interview by the defense, Mr. Fowler stated that Mooki was a friend of Mr. Curry's. He also stated that Mr. Curry had a "killing list" which he kept in a safe in the basement. Further, he stated that another person who visited the house also had a "killing list." Apparently, Mr. Fowler believes that Mr. Curry was one of the names on the other man's list. No physical evidence exists to support Mr. Fowler's claims nor did he tell anyone about these lists prior to his interview with defense counsel.

Applying the legal principles set forth in Rainer to these facts, it is apparent that the defendant has failed to meet his burden of proof to be granted a new trial on the basis of newly discovered evidence. First, the bulk of this evidence was known to the defendant at the time of trial. The defense had been given all of the police reports related to the 4th Street Saloon murder in which Marquaz Wright was named as a victim. Diamond testified that she saw a man named "Mooki"

leaving the house after the shooting. Mr. Fowler testified that he had seen "Mooki" sitting in a car outside 2922 Dupont on the morning after the murders. Through Ms. Clark's affidavit, we learn for the first time that Mr. Fowler actually told her during the trial that "word on the street" was that Mooki and Wright had committed the murders.

Testimony in the case ended early on March 21, 2008, The defendant had the balance of that day and a weekend to investigate Mr. Fowler's claim that Mooki and Wright were involved in the murders. Moreover, the defense could have asked for a continuance to further investigate these issues. Instead, the defense did not even disclose this rumored information to the Court or the State. The defense never sought a recess to explore their theories further.[2] The record clearly demonstrates that this information was known to the defense at trial and they chose not to pursue it, For these reasons, they fail to meet the first prong of the Rainier test.

The second prong in determining whether to grant a new trial is whether the evidence could have been discovered with due diligence before trial. In this case, the defense did not attempt to interview either Duane Fowler or Deandre Fowler prior to trial. Although they met with Duane Fowler in October 2007, they did not interview him about his knowledge of the facts surrounding these murders or of "rumors" he may have heard from the street. An individual named "Mooki" was on the contact list from Mr. Curry's phone. Although the defense obtained cell phone records for a large number of individuals, they never attempted to contact "Mooki" and never asked for the State's

assistance in locating him. Investigating Mr. Curry's known associates such as "Mookie" was certainly an avenue the Defense could have pursued before trial.

Third, the "evidence" put forth by the defense is at best doubtful. Rumors from the street are not competent evidence in a court of law. Although the defense in its argument claims to have eyewitness testimony that places "Mooki" and Wright at the scene at the time of the murders, this evidence is highly suspect.

A comment is in order concerning the testimony of the two Fowler children, Jasmine and Diamond.

The oldest of the two was five at the time of the murders. This Court felt it to be its duty to find, after an interview of each on the record, that each met the standard of Minnesota law to be competent witnesses. This does not mean that newly found testimony from either of the two (if in fact there is any) would meet the standard of Rainer.

Neither child observed the murder. Both were just barely above the age of infancy at the time of the murders. Both were nervous and suggestible as witnesses; one of them upon entering the courtroom hid under the witness and and had to be pried out from that location by defense counsel. Neither was called by the State even though they offered evidence hostile to the defense in pretrial interviews and the prosecution in its closing argument counseled the jury to be cautious of their testimony, even those parts that indicated defendant's guilt.

Diamond Fowler who was only five years old at the time of the murders was interviewed by a neutral forensic interviewer about her knowledge of the murders in July 2007. She identified one person as the shooter of both men: "Phil." In a pretrial interview by the defense, she failed to identify any other individuals by name. It was not until she testified in re-direct that she mentioned "Mooki" as a person leaving the house after the shooting. .During cross-examination she identified "Phil" as the person who shot Mr. Curry and Mr. Porter. In evaluating Diamond's testimony, it is critical to analyze the veracity of the other details she testified to. She stated that she was sleeping with her two sisters; that Patricia Walker was across the street sleeping with Jackie Mack; that she entered the kitchen by herself to determine if Mr. Porter was still alive; and that Mr. Porter's pants were pulled up when she saw him. This child's testimony was at odds with every other witness on each of these points. Given her age and suggestibility, it is unlikely that this jury or any other jury would give her testimony much, if any, weight.

Similarly, the information from Deandre about "kill" lists is doubtful. No physical evidence has been recovered in support of his claim. He failed to tell anyone about this information even given his claimed perception of the seriousness of it, Finally, this evidence would be hearsay if offered as substantive evidence at a trial.

Under the fourth prong of Rainer, the defense must show that "newly discovered" evidence would be likely to produce an acquittal or more favorable result at a new trial. The defense has not met this prong of the

Rainer test because of the overwhelming evidence of the defendant's guilt. The defendant was placed with the victims on the evening of March 13, 2007 by Danielle McLean, Ezster Farkus, Nova Meeks, Maurice Vasser, Marvin White, Karenlu Kendall, Sandra Fowler, Cassandra Simms and Patricia Walker. Nova Meeks testified that she saw the defendant with the victims at approximately midnight Testimony from Marvin White established that the defendant was present when he stopped by with Jackie Mack to collect money after midnight on March 14, 2007, Cassandra Simms placed the defendant in the kitchen with Mr. Porter when she got up to take her medication in the early morning hours of March 14, 2007. Both Cassandra Simms and Patricia Walker identified the defendant as the person walking out the door immediately after the murders.

Physical evidence further supports the eyewitness identifications. The defendant was found to be in possession of Mr. Porter's cell phone and used it to call numerous individuals in a flurry of calls right after the murders. The defendant eventually ended up at Walter Hall's house with a gun, money and crack in his possession. The defendant used Mr. Porter's phone to call a cab to take himself and a female companion to his room on Quincy N.E. Less than twelve hours after the murders, police found a gun in the defendant's room that was consistent with firing the bullets used to kill the victims. The gun had blood on it that was a match to Mr. Curry. The defendant's thumbprint was on the cylinder of the gun and his DNA was on the grip (99.98% of persons in the world could be excluded as contributors). The defendant's thumbprint was also found on Mr. Porter's cell phone. Shoes recovered from

the defendant had a unique tread pattern and the pattern was consistent with multiple footprints in blood found next to Mr. Porter's body. The defendant had Mr. Curry's blood an the jeans he was wearing at the time of his arrest.

The defendant has failed to establish any of the Raiser prongs. He is not entitled to a new trial on the basis of "newly discovered evidence" or "surprise."

The defense asserts "irregularity in the proceedings ... on the part of the prosecution." Defendant alleges prosecutorial misconduct, claiming that the State impeded his access to child witnesses.

The defense also claims irregularity "on the part of a witness (witness tampering by Lanika Harris)." The Rule does not provide for a new trial on the basis of irregularities on the part of witnesses. Even if such irregularity was contemplated by the Rule, defendant has failed to establish that he was denied a fair trial.

The essence of the defense claim of irregularity is that Lanika Harris threatened the defendant and his lawyers, chilling their ability to fully defend the case. The defense relies upon an affidavit filed by Ricky Jones in which he describes a conversation with a woman who he now believes was Lanika Harris. Ms. Harris allegedly told him that women in her family would do harm to the defendant if he was acquitted. Mr. Jones states that he communicated with Ms. Clark about this threat during trial. The defense states that this "threat" affected their decisions about whether the defendant testified, may have impacted Mr. Jones who was a prospective witness, and may have deterred their

investigation into the participation of "Mooki" in the murder.

This argument is truly extraordinary. If the defense was threatened, such threats should have been promptly brought to the attention of the Court and counsel for the State. Obviously, that did not happen. Further, Mr. Jones did not file a police report regarding these alleged threats notwithstanding Ms. Clark's claim that such threats should be prosecuted. Finally, Mr. Jones had no relevant testimony to offer at trial. The only disclosure regarding his involvement with the case was his assistance in taking photographs for the defense. Defense photographs were admitted as offered and, at best, Mr. Jones was an unnecessary foundation witness.

The defendant alleges that prosecutorial misconduct requires a new trial. One of the acts of misconduct is what defendant characterizes as Brady violations.

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brad v. Maryland, 373 U.S. 83, 87, 83 S.Ct, 1194, 10 L.Ed.2d 215 (1963). Since Brady, the Court has expanded the disclosure obligation to include impeaching information. see United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375 87 L.Ed.2d 481 (1985).

Brady disclosure applies only to material evidence See Brady, 373 U.S. at 87, 83 S.Ct. 1194. Evidence is material "if there is a reasonable probability that, had

the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 68Z, 105 S.Ct. 3375. The three components of a Brady violation are; "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently and prejudice must have ensued" Strickler v. Greene, 527 U.S. 263, 281-82 119 S.Ct.1936, 144 L.Ed.2d 285 (1999).

Sandra Fowler

Defendant claims that the State withheld exculpatory evidence provided by Sandra Fowler. Specifically, the defense asserts that in March, 2007, Ms. Fowler told representatives of the State that when she opened the door for the victims on March 14, 2007, the defendant was not with them. In addition, the defense claims that Sandra Fowler had previously told prosecutors that Jackie Mack had threatened to have someone come and shoot Eugene Curry.

These claims are contrary to the facts On March 14, 2007, Sgt. Rick Zimmerman took a taped statement from Sandra Fowler. This statement was preserved on tape and transcribed into a question/answer format.See Exhibit A. This is the only formal statement ever taken from Ms. Fowler, The statement was disclosed to the defense as part of routine discovery.

In March, 2007, victim-witness advocate Gretchen Shanight went to the shelter to meet Ms. Fowler. Ms. Fowler declined to speak during this meeting. Eventually, Ms. Shanight ended the meeting and

returned to the office. Despite defendant's contentions to the contrary, Ms. Shanight did not generate notes on a laptop computer or in any other format from her contact with Ms. Fowler. Indeed, Ms. Shanight does not even own a laptop computer. No interview took place because Ms. Fowler was electively mute. See Exhibit B, Affidavit of Gretchen Shanight.

Prior to presenting this case to the Grand Jury, Judy Johnston, Julie Allyn and Gretchen Shanight went to the shelter in a second attempt to speak with Ms. Fowler. Again, Ms. Fowler declined to speak during the initial stages of this meeting. Eventually, she was asked to read the statement she had provided to Sgt. Zimmerman. Ms. Fowler read that statement aloud. She provided no additional information beyond what was in the statement. See Exhibits 1, B, Affidavit of Judy Johnston and Affidavit of Gretchen Shanight. Specifically, during the March, 2007 interview, Ms. Fowler did not tell us that she had let Mr. Curry and Mr. Porter into the home. Ms. Fowler did not tell us that they returned to the home without the defendant. At no time did she disclose to us any threats made by Jackie Mack. The March/April 2007 "interview" consisted of her reviewing the Zimmerman statement.

On January 28, 2008, the State met with Ms. Fowler in the presence of her father to prepare her for trial. It was during this interview that Ms. Fowler was asked about the circumstances of the victims returning home on the day of the murder. She told us that she let the victims into the home but that the defendant was not with them, This information was immediately disclosed to the defendant in a letter dated January 29, 2008, and faxed to the defense the same day. Ms. Fowler never

stated that Jackie Mack had threatened Mr. Curry's life nor did she say anything about having someone come back to shoot Mr. Curry. The State heard this information for the first time when Ms. Fowler testified at trial. The State fully complied with its discovery obligations and disclosed all Brady evidence as required by law.

The defense claims that Julon Laird and Marvin White were interviewed on tape and that the State failed to disclose these tapes. These tapes do not exist. Ms. Laird is mistaken. Sgt. Scott Larson interviewed her in Room 108 on March 14, 2007. He states that she had no significant information so he did not take a formal statement from her. Sgt. Darcy Klund conducted two interviews of Marvin White. The first interview was done by telephone and, as Sgt. Klund testified, he did not record the call. The second interview took place in the Hennepin County Adult Detention Center just prior to trial. A formal statement was taken from Mr. White and both the tape and transcript were disclosed to the defense prior to trial. The State fully disclosed witness statements to the defense.

The defendant asserts that the State failed to comply with the Court's order to investigate Jackie Mack's claim that a retired Caucasian Minneapolis Police Officer lived next door to Ida Mae Mack. The defense believes that this individual had surveillance cameras operating and that footage from those cameras might exonerate the defendant. The defense claims that Sgt. Klund failed to comply with this Court's order to investigate whether video footage was available.

Whatever happened thereafter Sgt. Klund did not disobey a court order. Mr. Jeffrey John Larson was contacted and told Sgt. Klund he was not a retired police officer. Larson first reported he did not have surveillance cameras set up. As Mr. Larson's later affidavit shows this was true but misleading. Attached hereto is Exhibit 4, Larson's recent affidavit with enclosures. Mr. Larson states he is not a retired police officer and that no cameras were set up the day of the jurder. Mr. Larson belongs to some sort of block club and days, weeks or months before the murder he had taken pictures of 2922 Dupont Avenue North and traffic in the neighborhood. These pictures were provided by him and are attached to Exhibit 4. Also, Larson may have taken video footage days, weeks or months prior to the murder.

No violation of any court order by Sgt. Klund occurred and Larson had no evidence relating to the case.

Defendant claims that the police failed to disclose alternative perpetrator evidence that would have identified Marquaz Wright as a suspect. Defense bases this claim on rank speculation about whether Wright was brought to Room 108 by police in connection with an interview in this case.

Marquaz Wright was initially a suspect in the wholly unrelated 4th Street Saloon shooting that killed his best friend in February 2007. Police investigation cleared Wright of accidentally shooting his friend when VVright returned fire. David Bryant was actually the shooter and the defendant's friend Marvell Williams is also charged in that case. The police reports from the 4t" Street Saloon murder case were provided to the

defense in advance of trial. The reports show that Mr. Wright gave a statement about the 4th Street Saloon case to police on March 14, 2007. These reports were provided to defense before trial and were available to argue to the Court that Mr. Wright was an alternative perpetrator long before a verdict.

The defense suggests that it strains credibility that Sgt. Klund and Sgt. Hauglid would not know that this witness was in the same suite of offices at the Minneapolis Police Department on March 14, 2007. The point is that at any given time, multiple homicide, assault, and kidnapping cases are under investigation by Homicide investigators. Mr. Wright was never a suspect in the murders of Mr. Curry and Mr, Porter and he was never questioned or interviewed regarding this case.

Defendant has failed to establish that the State withheld any evidence about alternative perpetrators.
A claim is made by the defendant that the prosecution urged Mr. Fowler not to permit the defendant's attorneys to interview his young children.

Minn.R.Cr.Pro. Rule 9.03, Subd.1 states

> Except as otherwise provided as to matters not subject to discovery or covered by protective orders, neither the counsel for the parties nor other prosecution or defense personnel shall advise persons having relevant material or information except the accused to refrain from discussing the case with opposing counsel or from showing opposing counsel any relevant

> materials, nor shall they otherwise impede opposing counsel's investigation of the case.

The comments to Rule 9.03, Subd. 1 state that it is improper to suggest to a witness that they not meet with opposing counsel. Attorneys may, however, advise a witness that it is not required that they submit to an interview. Further, it is proper for counsel to request an opportunity to be present if the witness decides to grant an interview to opposing counsel.

The parameters of Rule 9.03, Subd. 1 were considered in sate v. Mussehl, 408 N.W.2d 844 (Minn. 1987). In that case, a prosecutor sent a letter to prospective witnesses advising witnesses of their right to decline an interview with defense investigators. The letter went further, however, and suggested potential negative consequences of granting such an interview. The Court held that the letters did not prejudicially impede the defendant's access to the witnesses. While the Court disapproved of the strong language in the letters, it declined to grant any relief.

In this case, Mr. Fowler was very clearly told that it was his decision whether or not to permit the defense to speak with his children. He was told that we could not ethically advise him whether or not he should grant interviews. The State stopped far short of the letters at issue in Mussehl. Indeed, Mr. Fowler demonstrated his independence when he declined to allow attorneys from either side to interview his children until just before trial. The State did not commit misconduct in its presentation of the law to Mr. Fowler and, in fact, the defense was given access to the children during the trial. To the extent that they learned new information,

this information was also new to the State. If they needed a continuance or recess to conduct further investigation, that issue should have been raised with the Court.

In fact, it is obvious that the defense made a strategy decision in failing to request a continuance to further develop information provided by the children.

DEFENDANT CLAIMS LEGAL ERRORS REQUIRE A NEW TRIAL

A post-verdict motion for a new trial based upon "legal errors" necessarily requires a finding by the Court that legal errors have occurred. If a legal error has occurred, the court must determine whether any error was harmless beyond a reasonable doubt. State v. Keeton, 589 N.W.2d 85, 91 (Minn. 1998). To determine whether an error is harmless, appellate courts look to the basis for the jury's verdict to see what effect the error had on that verdict. State v. Jones, 5s6 N.W.2d 903, 910 (Minn. 1996). "If the verdict actually rendered was surely unattributable to the error, the error is harmless beyond a reasonable doubt." Id. A defendant is entitled to a new trial if an error-or errors, taken cumulatively-had the effect of denying defendant a fair trial. Keeton at 91.

Prior to discussing the defense claims of legal errors some context is appropriate while it is not obvious from reading the trial transcript itself it would be obvious to a reader of the transcripts of pretrial hearings in the case that the defense the defendant wished to pursue was that he had been framed by the Minneapolis Police Department. This defense was never presented in so

many words to the jury because the defendant was unable to find any admissible evidence that he was framed. While the Court's opinion on the next point is neither here nor there, is it the opinion of the Court that such evidence could not be found because it does not exist. Certainly, no hint of it trickled through to the Court.

The closest the defense came to raising this issue to the jury was a claim that the police settled on the defendant as the perpetrator of the murders in the first hours of the investigation and did not search for evidence that anyone else could be guilty. So the defense of police frame up decayed to a theory of a negligent investigation focused only on Philander Jenkins.

Obviously, the jury did not accept this theory and one can see why. Even a casual examination of the time line of the investigation indicates that Mr. Jenkins did not lead to the evidence, the evidence led to Mr. Jenkins and to no one else While it is human nature to stop looking for one's car keys after one finds them, the evidence in this case could well convince a jury that the police conscientiously looked for evidence at every step of the investigation, followed the evidence where it led and it all led to Mr. Jenkins. A jury could well conclude that the police examined the case thoroughly even after it was fairly clear Mr. Jenkins was the culprit.

One legal error cited by the defendant in support of his motion is that the Court excluded evidence of defendant's lawsuit against Minneapolis Police Officer Jindra.

The State filed a pretrial motion in limine seeking a ruling that evidence of the defendant's lawsuits against the Minneapolis Police Department, the Hennepin County Sheriff's Department and the Minnesota Bureau of Criminal Apprehension be excluded from trial. The State's argument was based upon Rule 403 considerations. When the motin in limine was argued, the defense did not object to a ruling regarding the exclusion of such evidence. In fact, the Defense did not want this evidence in so long as Spreigl evidence against the defendant was not admitted. The defense now complains that such evidence would have been relevant to establish a motive on the part of the Minneapolis Police Department to plant evidence. He argues that he did not receive a fair trial because the jury consisted "mostly of white suburbanites with little if any experience in the criminal justice system." In that connection it is interesting to note two blacks were on the jury. No objection to the venire was ever made.

No reasonable jury could have concluded based on the evidence submitted at trial, that the police planted evidence. The testimony from lay witnesses was that the defendant had the same gun in the days before the murders and had a gun with him immediately after the murders. Less than twelve hours later, a gun with one of the victim's blood on it was recovered from his room along with more than $400 cash, cocaine, and the other victim's cell phone. His fingerprints were on the cylinder of the gun along with his DNA on the grip. One of the victim's blood was found in several locations on the defendant's jeans. A shoeprint similar to the defendant's was found in blood next to Mr. Porter's body. The evidence overwhelmingly established the

defendant's guilt and there was no evidence that the police planted evidence,

A second legal error cited by the defendant was the Court's finding that the defendant did not meet the legal threshold for declaring witnesses to be alternative perpetrators.

The defendant named Cassandra Simms and Patricia Walker as alternate perpetrators in its pretrial motions. Besides the fact that both women were sleeping inside the home when the murders occurred, the defense had no additional evidence to suggest that either woman was involved in the crime. The Court did rule that the defense had failed to make a suffiicient showing for either woman to be declared an alternate perpetrator. The only effect of the ruling was to preclude "reverse-Spreigl" evidence against either witness. The defense never noticed the State of reverse-Spreigl evidence on any of its witnesses. At trial, the defense still presented its theory that one or both of the women were involved in the murder.

The reverse Spriegl offered against Cassandra Sims was that on a prior occasion she had thrown a harmfiul chemical or acid in the face of a person who was sexually assaulting her. The Court made clear in its oral ruling denying the admission of this evidence that the denial was not based on the defense failure to give notice (though that would have been a valid ground) and not based on the fact that Cassandra Sims was not shown to be an alternative perpetrator (though that also would have been a valid ground) that because even if Cassandra Simms had been found to be an alternative perpetrator the offerred "reverse Spriegl" would not

have been admitted. It was not relevant to whether or not she murdered either of these two men. There was no evidence that either victim had sexually assaulted her or tried to do so. There is no reason to believe that the fact she defended herself against what she thought was a sexual assault in the past would show or indicate in any way she would have been likely to kill those men. The reverse Spriegl was denied for the exact same reason the Court denied the Spriegl offered against the defendant, that is that it did not show or indicate he killed these two victims or anyone else. Neither offered Spriegl, against Jenkins or against Simms that were relevant.

The defense argues that the Court should have sanctioned the State for the failure of the police to collect footwear impressions from Cassandra Simms and Patricia Walker.

It argues that it is prejudiced now that it has learned that Ms. Walker has Air Jordan shoes. The defense also argues that it did not have all of the footwear impression evidence at the time of trial.

The defense had an opportunity to review evidence in the property and evidence room as well as evidence that was kept at the Bureau of Criminal Apprehension. The State produced the actual footprint exemplars for defense review during the trial. The testimony at trial was limited to consistencies: that the shoes worn by the defendant at the time of his arrest matched the footprint in blood left at the scene. The shoes were the same size; the shoes had the same design; and the individual spacing between the patterned lines was identical. Mr. Melander's testimony followed a detailed

outline that he prepared and that was disclosed to the defense prior to trial.

The State did fail to tell the defense that Mr. Melander had consulted with the FBI and Nike in an attempt to determine how rare the shoe in question was. Mr. Melander disclosed that information to the State immediately before his testimony. Although the testimony would have been helpful to the State, in the State's opinion, it became available too late for the State to offer it. While it should have nonetheless been disclosed to the defense, such evidence certainly was not exculpatory and could not possibly have impacted the jury. The Court finds the failure to disclose this information was harmless beyond a reasonable doubt.

The defense also complains that its "experts" were not given sufficient access to the evidence and this impacted their ability to call these experts at trial. In fact, defense experts were given full access to all of the evidence in this case. When the firearm "expert" stated that he was unable to compare the bullets by viewing them at the same time, the Court asked the State to provide him with a second opportunity The defense firearms "expert" never came back to see the evidence again.

The experts were not called by the defense and the decision not to call them was tactical.

The defendant cites as a reason for a new trial the denial of defense motions for pretrial depositions.

The Rules of Criminal Procedure contemplate pretrial depositions only when the witness will not be available

for trial. The defense sought an opportunity to depose this witnesses as part of a discovery process. The Court denied their request. The use of civil discovery practices in a criminal case was recently addressed in State v. Deal, 740 N. W.2d 755 (Minn. 2007) . In that case, a civil action was used by a criminal defendant in an attempt to get more expansive discovery in a criminal case. The Court clearly held that a criminal defendant is confined to the discovery rules set forth in the Rules of Criminal Procedure.

The defense in this case attempted to use a similar process. A wrongful death action was filed on behalf of Mr. Porter's children. This Court had denied the defense motions to take depositions of Cassandra Simms and Patricia Walker because the defense failed to show that these witnesses would be unavailable for trial. The Court also had under advisement a ruling regarding who could grant access to the children. Ultimately, judge Holahan, the Judge in the civil case, stayed the proceedings in the civil matter while the defense unsuccessfully pursued a Writ of Prohibition.

The defendant seeks a judgment of acquittal because the evidence is insufficient to support the jury's verdict.

It is interesting to note the defense did not make this motion at the close of the State's case, though given an opportunity to do so.

In any event, "A defendant bears a heavy burden to overturn a jury verdict." State v. Vick, 632 N.W.2d 676, 690 (Minn. 2001). In determining whether evidence in the record supports a jury's verdict, courts review the evidence in a light most favorable to the State. State v.

Rhodes, 657 N.W.2d 823, 840 (Minn. 2003). Further, the court must also assume the jury believed the State's witnesses and disbelieved any contrary evidence, including the defendant's testimony and the defendant's theory of the case. Rhodes, 657 N.W.2d at 840; Vick, 632 N.W.2d at 690. The role of the reviewing court is not to retry the facts of the case, but to "[consider] the evidence and [determine] whether the jury could reasonably find the accused guilty of [the crime charged]." State v. Folkers, 581 N.W.2d 321, 326 (Minn. 1998)(citing State v. Wahlberg, 296 N.W.2d 408, 411 (Minn. 1980)).

Defense claims that there were "inconsistencies" in the evidence that rise to the level requiring the Court take the verdict away from the jury. In support of this extreme remedy, Defense submitted "Exhibit R" as a list of "inconsistencies or unbelievability (sic) in the State's case". Despite the fact that testimony for this trial lasted for several weeks and consisted of numerous witnesses and more than 300 exhibits, Defendant's Exhibit R is only one page containing ten points. The majority of the points in Exhibit R are simply Defendant's attempts to reargue factual inferences. Defendant's desire to dispute facts that were best left to arguing in closing argument, does not meet the heavy burden for this Court to overturn the jury verdict.

For example, Defense argues at point number 10 in Exhibit R that: the "State made argument it was Jenkins' shoeprint in blood at the scene; yet State's own witness had tested Jenkins "shoes twice and found no blood." The fact that there was no blood on Defendant's shoes was evidence before the jury to consider and

available for Defense to use in arguing that Defendant was not guilty. Clearly the jury chose to disbelieve this (arguably) "contrary evidence" and still found Defendant guilty. Moreover, it is arguable that this fact is even "contrary". Specifically, the lack of blood on Defendant's shoes twelve hours after the murder does not mean the shoeprint next to Mr. Porter was not Defendant's shoeprint, since it is arguable that the blood came off of Defendant's shoe sometime following the murders. In any event, at this procedural posture, the Court must assume that the jury disbelieved "contrary evidence" such as this bloody shoe issue in evaluating Defendant's motion for acquittal. See Rhodes at 840 Just because the jury was not persuaded by evidence that Defense finds compelling is not sufficient reason to overturn a jury verdict. This analysis applies to all of Defendant's points detailed in their Exhibit R.

Defendant's sparse ten points of "inconsistencies" is dwarfed by the overwhelming evidence of guilt that clearly totals sufficient evidence to support the jury's guilty verdict. The evidence of guilt is substantial in this cases Defendant was one of the people last seen with the victims alive; Defendant had Mr. Porter's missing cell phone in his room; police recovered a bloody gun from Defendant's roam; one sample of blood on the gun belonged to Mr. Curry; Defendant's thumbprint was found on the gun; police found a large amount of cash in Defendant's room, despite the fact that Defendant had no money the evening before the murders (and the victims, who normally had money, did not have money on their persons; some of the bloodstains on Defendant's jeans belonged to Mr. Curry; footwear impressions from Defendant's shoes

matched the tread pattern of footprints found in blood next to Mr. Porter's body; Cassandra Simms identified Defendant as leaving the home immediately after the shooting; and Patricia Walker identified hearing Defendant's voice immediately after the shooting.

The fact that Defense failed to convince the jury to ignore this overwhelming evidence and believe their inferences of the facts, is not a sufficient argument for this Court to grant a judgment of acquittal.

For the foregoing reasons the motion for a new trial, motion for acquittal and of other related motions are denied.

IT IS SO ORDERED
BY THE COURT;
Judge Thor Anderson

Footnotes

1 Clark states in paragraph 10 of her affidavit that this information was immediately disclosed to the State by providing Exh. K2. A review of Exh. K2 reveals NO mention that "word on the street" was that Mooki and Wright committed these murders. Instead, Mooki is described as a "light-skinned dude" in the "drug biz" and "in car outside Dupont." No reference is made to Wright.

2 The Court took a one-day recess for a conflict by one of the prosecutors and a half day recess for a conflict by the defense. A brief continuance would have been granted had the defense requested it.